Supreme Court, U. S.
FILED
MAY 16 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

76-1608

No. [redacted]

STATE OF MICHIGAN,
Petitioner,

v.

LOREN TYLER and ROBERT TOMPKINS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Now comes the State of Michigan, by L. Brooks Patterson, Prosecuting Attorney in and for Oakland County, and Petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Michigan.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court was filed on February 14, 1977, and is reported at 399 Mich 564; _____ NW2d _____ (1977). That opinion reversed a decision of the Michigan Court of Appeals filed on November 1, 1973, which is reported at 50 Mich App 414; 213 NW2d 221 (1973). Copies of both opinions are included in the appendix to this petition.

JURISDICTION

The decision of the Michigan Supreme Court was filed on February 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Although the opinion of the Michigan Supreme Court is mildly ambiguous as to whether the searches complained of are invalid under the federal or state constitution, it refers to the Michigan constitutional search and seizure provision, Const 1963, Art 1, Sec 11, only once. 399 Mich at 569. An examination of the lengthy analysis shows that it is based entirely upon federal law. The only decisions cited as controlling are federal, except for two state cases, *Department of Natural Resources* v *Seaman*, 396 Mich 299, 314-317, 321-324; 240 NW2d 206 (1976), and *People* v *White*, 392 Mich 404; 221 NW2d 357 (1974), which are themselves based upon the Fourth Amendment.

The Michigan Supreme Court generally has followed this Court's decisions on search and seizure questions.

See, in addition to *White* and *DNR* v *Seaman*, *supra*, People v *Whalen*, 390 Mich 672, 676-683; 213 NW2d 116 (1973). The Court said in *People* v *Moore*, 391 Mich 426, 435; 216 NW2d 770, 775 (1974) (footnote 6 omitted):

> While Const 1963, art 1, §11 protects against "unreasonable searches and seizures", its proviso prohibiting the exclusion from evidence of "any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house", precludes a construction of the Michigan search and seizure clause imposing a higher standard of reasonableness for searches and seizures of items named in the proviso than the United States Supreme Court has held applicable under the Fourth Amendment.[7]

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[7] *Cf. People* v *Turner*, 390 Mich 7; 210 NW2d 336 (1973) (entrapment); *People* v *White*, 390 Mich 245; 212 NW2d 222 (1973) (double jeopardy), where this Court established standards higher than the Federal standards.

On December 22, 1970, Respondents made a timely pre-trial motion to suppress evidence on the ground of an illegal search and seizure, and made similar motions each time disputed evidence was introduced at trial (R. 188-192, 741-747). The Fourth Amendment right against unreasonable searches and seizures was thereby raised and preserved by clear implication.

QUESTIONS PRESENTED

I

Whether a warrantless search of fire-damaged premises to determine the cause or origin of the fire, conducted after the fire has been extinguished and at the first opportunity to make a daylight visual inspection, is constitutionally permissible?

II

Whether a warrantless search of fire-damaged premises to gather evidence of the cause or origin of the fire, conducted weeks after the fire occurred and under circumstances which indicated that the occupant's expectation of privacy in those premises had dissipated, is constitutionally permissible?

III

Whether, in a prosecution for conspiracy to burn real property, a co-conspirator who was not on the premises at the time of the contested searches, who had no possessory or proprietary interest in the premises, and who was not charged with a possessory offense, has standing to raise the issue of an unconstitutional search and seizure?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which this petition involves is:

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

Loren Tyler and Robert Tompkins were convicted of conspiracy to burn real property. Tyler was also convicted of burning real property and burning insured property with intent to defraud.

The fire occurred at Tyler's Auction in Waterford Township, Michigan, a building leased by Tyler where he conducted a retail furniture business (R. 210-213). Tompkins was a business associate of Tyler's (R. 1144-1155, 1237).

Physical evidence, taken by fire and police officials without a search warrant from the premises after the fire had been extinguished, was admitted at the trial over objection (R. 188-192, 741-747)

The fire began with two loud explosions shortly before midnight on January 21, 1970 (R. 69-70). The fire department arrived shortly thereafter. Fire Chief See discovered and seized two plastic containers, one partially filled with a flammable liquid, before the firefighters left (R. 145-146). Respondents did not challenge the admissibility of that evidence in the Court below.

Chief See conferred with Detective Webb of the police department at the scene shortly before the firefighters left. Webb's efforts to take pictures of the interior of the building were unsuccessful due to a malfunctioning camera and the fact that the building was filled with smoke and steam (R. 247).

By 4:00 a.m. on January 22 the fire was extinguished. The premises were thereafter left unattended until 8:00 a.m. when See returned with Assistant Fire Chief Somerville and together they briefly surveyed the area (R. 174-175, 206-207).

Most of the interior of the building and all the furnishings and fixtures had been almost completely consumed by fire. Almost all that remained were metal parts of furniture. The acoustical ceiling had fallen onto the floor, and the steel support beams above were twisted and had all been very badly damaged by heat and fire (R. 177-178). However, the northwest and northeast sections of the building were not as badly damaged. Though all the furniture fabric had been destroyed, a few pieces of wooden framework were merely scorched and damaged by smoke, and there were some business records on the floor which had not been completely destroyed (R. 178, 681-682, 709).

Assistant Chief Somerville, who did not know the identity of the landlord and had been informed that the tenant was in Florida (R. 191-192), returned with Detective Webb between 9:00 and 9:30 a.m. and discovered pieces of tape along a thin linear burn mark in the carpet of one room (R. 179, 251-253). The burn circled the room, went through a door, and continued down a stairway to an exit (R. 181-183). Pieces of carpet and wood containing the burn marks were removed, and at the trial admitted over objection (R. 185, 188-192).

Four days later, on January 26, Sergeant Hoffman of the Michigan State Police, Arson Section, took photographs of the interior of the building which were lost in the mail (R. 655-656).

On January 29, Hoffman and Somerville met with Respondent Tyler at the fire station (R. 705-706). Tyler was advised of his Miranda rights, and agreed to talk with the officials (R. 706-707). After having been informed of the condition of the burned building, Tyler gave the opinion that arson must have occurred (R. 708). Following a brief discussion of insurance and the contents of the building, Tyler agreed to go with the officials to survey the scene of the fire, where he pointed out various missing articles (R. 708-709). No photos were taken or evidence seized at that time.

Sergeant Hoffman returned without Tyler three weeks later, on February 16, and took more photographs, which were admitted at trial without objection (R. 657-658). He also found a piece of fuse and pieces of glass and other debris, which were admitted over objection (R. 660, 741-747).

All items of disputed evidence tended to show that the fire had been deliberately set, but none tended to identify the perpetrator.

REASONS FOR GRANTING THE WRIT

I

The Michigan Supreme Court, in an opinion reversing Respondents' convictions, extended the Fourth Amendment warrant requirement by holding that fire and police officials need an administrative search warrant under *Camara* v *Municipal Court*, 387 US 523 (1967), and *See* v *Seattle*, 387 US 541 (1967), before searching fire-damaged premises for the cause of the fire once that fire has been extinguished. The opinion relied upon this Court's distinction between regulatory, administrative, and criminal investigative searches, the rationale for which is the relative intrusiveness of each type of search. Petitioner contends that the Michigan Supreme Court's analysis is inappropriate to post-disaster investigations, which do not deal with occupied homes and operational businesses, and which are conducted prior to a determination of whether a crime has occurred.

Ordinarily, the motivation behind each type of search tends to control its scope and relative intrusiveness. However, an investigation of the scene of a fire or other catastrophe to determine its source is not so controlled. All fires and disasters have a cause, and searches for accidental and deliberate causes are likely to be identical or nearly so in scope. Regardless of whether officials are suspicious of arson,[1] a search for the cause or origin of a

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[1]The Michigan Supreme Court held that probable cause existed for a criminal investigative search warrant when Chief See discovered two plastic bottles, one partially filled with a flammable liquid, at the time of putting out the fire. 399 Mich at 577. Yet the presence of flammable liquids, solvents, and polishes at a commercial establishment seems as consistent with an accidental fire as with arson. Petitioner contends that only upon the investigators' return the following morning, and their discovery of tape and a thin burn mark, was probable cause established.

fire is limited by its nature to burnt areas and possible sources of combustion. Though such an investigation is detailed and focused in its technical aspect, it is narrow and unobtrusive in its potential for abuse and invasion of privacy.

The scope of the search in this case was statutorily limited, as was that in *United States* v *Biswell*, 406 US 311, 315 (1972). Michigan Compiled Laws, Sec 29.6, provides:

> The director or any officer is authorized to investigate and inquire into the cause or origin of a fire occurring in this state resulting in loss of life or damage to property, and for that purpose may enter, without restraint or liability for trespass, any building or premises and inspect the same and the contents and occupancies thereof.

This provision allows investigations only into the cause or origin of a fire. Though such a search would be broad enough to discover the means by which a fire had been deliberately set, the statute does not purport to allow the wide-ranging criminal investigative search commonly directed toward identifying the perpetrator of a crime. Similar statutes are common throughout the United States,[2] suggesting that warrantless searches for the cause or origin of a fire are widely regarded as reasonable.

There is little, if any, reasonable expectation of privacy in premises that have been badly burned or damaged, at

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[2]*E.g.*, Ala Code, 55 §34; Ark Stat Ann, 82-817; Ga Code Ann, 92A-723; Hawaii Rev Stat, §132-5; Ill Rev Stat, 127½ §6; Kan Stat Ann, 31-137; Md Code Ann, 38A §33; Minn Stat Ann, 299F.04, 299F.08; Ohio Rev Code, §3737.08; Or Rev Stat, 476.070 (1); Pa Stat Ann, 53 §16598.

least in those areas likely to be the subject of an inspection for the cause or origin of the fire. Such premises are temporarily or permanently uninhabitable. Families and businessmen whose homes and buildings catch fire certainly have their privacy invaded or interrupted, but not as a result of government action. Firefighters and police are legitimately present to extinguish the blaze and limit its effect, to save lives and property, and to control individuals and crowds.

It is difficult to imagine circumstances under which firemen and police arriving at the scene of a fire could be construed as invaders of privacy, or as oppressive agents of the state. They arrive in a benevolent role, and, after extinguishing the fire, their duty to investigate the cause or origin of that fire furthers vital public and private interests. Victims of a fire are unlikely to have their privacy interrupted unreasonably by inspections of gas, fuel oil, or electrical systems, or of burnt areas of their homes or businesses, which do not involve an examination of personal papers and effects.[3] In the case of a nighttime fire, such an investigation should reasonably take place during daylight hours, after smoke and steam have dissipated sufficiently to allow unobstructed vision.

Fire insurance policies typically contain a clause requiring the insured to allow inspection of the premises by an agent of the insurance company.[4] Respondent Tyler's contracts contained such a clause (Exhibits P and

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[3]Even arsonists are protected in this respect, inasmuch as they have control over the timing of the fire, and can be presumed to have removed personal items beforehand.

[4]See, *e.g.*, Mich Comp Laws, 500.2832, lines 113-115; Cal Code, Ins §2071; NY Consol Laws, Ins Law §168, lines 113-115; Pa Stat Ann, 40 §636, lines 113-115.

Q), and an insurance adjustor assisted fire and police officials in the investigation of this case (R. 764-766). Petitioner does not contend that contractual consent to the inspection of fire-damaged premises by an insurance investigator is somehow transferred into consent to a similar inspection by law-enforcement officers. Such an agreement is, however, relevant to an occupant's expectation of privacy in the burned premises.

The crime of arson is unusual in that probable cause to believe it occurred ordinarily cannot be obtained without an investigation of the scene of the fire. In most cases, police search to find evidence which tends to identify the perpetrator of a known crime, and are not often confronted with a challenge to their search of a potential crime scene. Cases dealing with the intrusiveness of criminal investigative searches of premises usually presuppose the unchallenged existence of the corpus delicti of an offense — a prerequisite to probable cause — which is almost always established with the cooperation of the victim.

The Michigan Supreme Court recognized that the inspections in *Camara* and *See* were to uncover possible violations of health, fire, and building codes, which may constitute the corpus delicti of misdemeanors. Yet the public interest in determining the cause or origin of an actual fire or disaster is substantially greater than that in the discovery of code violations, each of which by itself involves only a slight possibility of future personal injury or property damage. Accordingly, the timing of the inspection, at the first opportunity at which a thorough visual examination of the scene is possible, is an important element of the need to search.

The Court below found especially significant the statement in *Camara*, *supra*, at 538, that, whatever the standards for an administrative search warrant, "they will not necessarily depend upon specific knowledge of the condition of the particular dwelling." But even the less-demanding standard of probable cause of *Camara-See* seems inappropriate to post-disaster investigations. Whatever reduced legislative or administrative standards might be applied to a routine preventive building, health, or fire code inspection based upon the passage of time, nature of the building, or condition of the area, a fire or other disaster resulting in personal injury or damage to property is a readily-ascertainable fact. The judgment of a disinterested magistrate should not be required to determine its occurrence, because no exercise of judgment is necessary.

Only Michigan and Indiana[5] require a search warrant for an investigation of fire-damaged premises. Other state[6] and federal[7] courts have permitted warrantless

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[5]*State* v *Buxton*, 238 Ind 93; 148 NE2d 547 (1958). Though there is an apparent split of authority in California, *cf Romero* v *Superior Court*, 266 Cal App 2d 714; 72 Cal Rptr 430 (1968), *with Swan* v *Superior Court*, 8 Cal App 3d 392; 87 Cal Rptr 280 (1970), the most recent case, *People* v *Saling*, 48 Cal App 3d 724; 122 Cal Rptr 1, 13-14 (1975), suggests that a warrantless investigation after the fire has been extinguished is permissible.

[6]*State* v *Cohn*, 347 SW2d 691 (Mo, 1961); *Bennett* v *Commonwealth*, 212 Va 863; 188 SE2d 215 (1972); *Stone* v *Commonwealth*, 418 SW2d 646, 652 (Ky App, 1967); *State* v *Rees*, 258 Iowa 813; 139 NW2d 406 (1966); *State* v *Murdock*, 160 Mont 95; 500 P2d 387 (1972); *State* v *Vader*, 114 NJ Super 260; 276 A2d 151 (1971); *State* v *Felger*, 19 Or App 39; 526 P2d 611 (1974).

[7]*United States* v *Gargotto*, 510 F2d 409 (CA6, 1974); *United States* v *Green*, 474 F2d 1385 (CA5, 1973); *Steigler* v *Anderson*, 360 F Supp 1286 (D Del, 1973).

searches for the source of a fire. Since arson for profit has become a serious problem, this Honorable Court should resolve the conflict in decisions, grant this petition, and hold that such searches are constitutionally permissible.

II

Sergeant Hoffman conducted a search of the burned-out building on February 16, three and one-half weeks after the fire and two and one-half weeks after having examined the premises with Respondent Tyler. At that time Hoffman seized a piece of fuse, pieces of glass, and other debris, all of which were admitted at trial over objection.

Petitioner contends that this search was merely a continuation of a search valid at its inception, and that it occurred at a time when Tyler no longer had a reasonable expectation of privacy in the premises.[8]

Tyler was the lessee, not the owner, of the burned building. At the time of the February 16 search he had failed to pay the rent on his month-to-month leasehold (R. 926, 928), although the owner of the building had agreed to let him leave his fire-damaged debris on the premises for an unspecified length of time (R. 927). All of Tyler's business records had been destroyed in the fire (R. 369), and the only records that remained belonged to LaLonde, the owner of the building (R. 883-884). The

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[8]Petitioner contends in Issue III that Respondent Tompkins never had an expectation of privacy in the premises.

building had been extensively damaged, and all of Tyler's commercial inventory had been destroyed.[9]

Tyler had been cooperative with investigators who had told him that they suspected arson. His attitude, expressed after having been read his Miranda rights, had been that he, too, suspected arson (R. 708), and was interested in discovering the identity of the perpetrators. He had acquiesced in a survey of the premises by Sergeant Hoffman (R. 708-709). The terms of his fire insurance contracts required that the premises be available for inspection by insurance adjustors (Exhibits P and Q), one of whom had assisted in the arson investigation (R. 764-766). Tyler never took any affirmative action to secure the premises, and what security there was was provided by fire and police authorities (R. 709).

This Court should uphold the admissibility of evidence found in a search conducted after Respondent Tyler no longer had a reasonable expectation of privacy in the burned premises.

III

Respondent Tompkins was not on the premises at the time of the contested searches, had no proprietary or possessory interest in Tyler's Auction, and was not

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[9]It may be more accurate to say that none of Tyler's commercial inventory remained. The prosecution's case tended to show that Tyler had moved most of his commercial inventory to a warehouse immediately before the fire, and had replaced it with worthless furniture (R. 388-390).

charged with a possessory offense. He lacks standing to raise the issue of an unconstitutional search and seizure under this Court's holding in *Brown* v *United States*, 411 US 223, 229 (1973).

The question of Tompkins' standing was raised before the Michigan Supreme Court, which refused to consider the issue[10] because the prosecution had not raised it in the Michigan Court of Appeals. 399 Mich at 571. In so holding, the Court exercised its discretion not to consider this federal question because of a procedural impropriety, although under Michigan law it had the power to do so. *People* v *Crittle*, 390 Mich 367, 370-371, 212 NW2d 196 (1973); *People* v *Moore*, *supra*, at 431; 216 NW2d at 773. Under these circumstances, this Court has jurisdiction to decide the substantive issue. *Williams* v *Georgia*, 349 US 375, 382-389 (1955).

Although the prosecution rarely if ever is granted the procedural latitude allowed defendants in raising federal questions, there are two good reasons for this Court to exercise its jurisdiction to decide the standing question.

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[10]Although the Court below expressly declined to consider this issue, its citation of authority, 399 Mich at 571, fn 7, suggests that the Court had one eye on the merits of Petitioner's claim and that it is inclined to grant standing to any co-defendant, contrary to this Court's holding in *Brown*, *supra*.

The Court's statement that, "Our disposition makes it unnecessary to decide whether a codefendant has standing to raise a search and seizure issue," would be unexceptionable if the Court's opinion upheld the search in this case, and Tompkins' conviction were thereby affirmed regardless of whether he had standing. The statement is difficult to understand in light of the Court's actual decision, however, as a ruling in favor of Petitioner's position on the standing issue would not have resulted in a reversal of Tompkins' conviction.

First, Respondent Tompkins was not prejudiced in any way by the prosecution's failure to raise this issue in a timely manner. Since the trial court's ruling was in favor of the admissibility of the evidence, he had to endure the trial and appellate process regardless of whether the standing issue had been litigated earlier.

Second, this Court's failure to resolve the standing question, if a decision on the merits in favor of Petitioner seems likely, would result in a retrial of Tompkins identical to his original trial. All of the disputed items of evidence would be admissible against him. His retrial could not be the least bit fairer,[11] or more constitutionally correct, than his first trial.

This Court should exercise its jurisdiction and hold that Respondent Tompkins had no standing to challenge the search and seizure in this case.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan.

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[11] "Tompkins' retrial would, in all likelihood, be less fair than his first trial, insofar as the prosecution would have difficulty mustering the same evidence seven years after the offense, and because it would give Tompkins an undeserved second chance at a not-guilty verdict.

OPINION OF THE SUPREME COURT

Docket Nos. 55396, 55397.
Argued September 13, 1974 (Calendar No. 18). —
Decided February 14, 1977.

50 Mich App 414; 213 NW2d 221 (1973) reversed.

LEVIN, J. Loren Tyler and Robert Tompkins were convicted of conspiracy to burn real property.[1] Tyler was also convicted of burning real property[2] and burning insured property with intent to defraud.[3]

The fire occurred in premises leased by Tyler where he conducted a retail furniture business. Tompkins was a business associate of Tyler.

Physical evidence, taken by police and fire officials without a search warrant from the premises after the fire was extinguished, was admitted at the trial over objection.

The question is whether the authorities may enter fire-damaged premises without a warrant after the fire is extinguished for the purpose of investigation and, if discovered, collection of evidence of arson.

The Court of Appeals held that the provisions of the Fourth Amendment and the corresponding provisions of this state's Constitution,[4] prohibiting "unreasonable searches and seizures", do not "apply to the investigation of burned premises to determine whether

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[1] MCLA 750.157a; MSA 28.354(1)

[2] MCLA 750.73; MSA 28.268.

[3] MCLA 750.75; MSA 28.270.

[4] Const 1963, art 1 §11.

the fire was the result of arson where some evidence of arson is found during the process of extinguishing the fire". The Court reasoned that "the investigation of a fire to determine if arson has been committed does not place a person under criminal investigation. It places the cause of the fire under investigation."[5]

We reverse and remand for a new trial.

The fire broke out shortly before midnight on January 21, 1970. The fire department arrived soon thereafter. Fire Chief See discovered and seized two plastic containers, one partially filled with a flammable liquid, before the firefighters left. Defendants do not challenge the admissibility of that evidence.

Chief See conferred with Detective Webb of the police department at the scene shortly before the firefighters left. Webb's efforts to take pictures of the interior of the building were unsuccessful.

By 4 a.m. the fire was extinguished. The premises were thereafter left unattended until 8 a.m., when See returned with an assistant fire chief and together they briefly surveyed the interior of the building.

The officials again returned to the scene of the fire between 9 and 9:30 a.m. and discovered a thin linear burn in the carpet of one room. The burn circled the room, went through a door and continued down a stairway to an exit. Pieces of carpet and wood containing the burn marks were removed, and at the trial admitted over objection.

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[5]*People* v *Tyler*, 50 Mich App 414, 418, 419; 213 NW2d 221 (1973).

Four days later, on January 26, a sergeant of the Michigan State Police, Arson Section, took photographs of the interior of the building which were lost in the mail. The sergeant returned with Tyler three days later, on January 29, but no evidence was then obtained. The sergeant returned again without Tyler three weeks later, on February 16, and took more pictures and removed part of a fuse found in the building and several pieces of glass, which were admitted in evidence over objection.

The Court of Appeals found that "[c]onsent for the numerous searches was never obtained from defendant Tyler".[6] While Tyler did accompany the State Police sergeant when he visited the premises on January 29, and may not have objected to that inspection, none of the evidence admitted over objection was obtained at that time.

The people contend that Tompkins, who, in contrast with Tyler, did not have a leasehold interest in the burned premises, has no standing to raise the search and seizure issue.[7] The prosecutor did not raise this

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[6]*Id*, p 418.

[7]*See Jones* v *United States*, 362 US 257; 80 S. Ct 725; 4 L Ed 2d 697 (1960).

The standing issue is discussed in Allen, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties*, 45 Ill L Rev 1 (1950); Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U of Ill L Forum 78; Traynor, *Mapp* v *Ohio At large in the Fifty States*, 1962 Duke L J 319.

(continued on following page)

issue in the Court of Appeals,[8] and, therefore, it will not be considered.[9]

I

The primacy of the warrant requirement is well established.[10] "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v Municipal Court of City & County of San Francisco*, 387 US 523, 528-529; 87 S Ct 1727; 18 L Ed 2d 930 (1967).

(continued from preceding page)

The Supreme Court of California, in *People* v *Martin*, 45 Cal 2d 755; 290 P2d 855, 857 (1955), allowed a codefendant to raise the search and seizure issue. This rule was reaffirmed in *Kaplan* v *Superior Court of Orange County*, 6 Cal 3d 150; 98 Cal Rptr 649, 653; 491 P2d 1 (1971). *Cf. United States* v *Valencia*, 541 F2d 618 (CA 6, 1976). The American Law Institute, in its proposed Model Code of Pre-Arrangement Procedure, has accepted the view that a motion to suppress things seized may be made by a codefendant who may himself be without standing. ALI Model Code of Pre-Arraignment Procedure (Official Draft No. 1, 1972), §290.1(5).

Our disposition makes it unnecessary to decide whether a codefendant has standing to raise a search and seizure issue.

[8]Defendants' joint brief in the Court of Appeals discusses the question of Tyler's standing, but does not refer to Tompkins' standing. In the people's brief, only Tyler's standing was challenged.

[9]*See Long* v *Pettinato*, 394 Mich 343, 349; 230 NW2d 550 (1975).

[10]*Vale* v *Louisiana*, 399 US 30, 35, 90 S Ct 1969; 26 L Ed 2d 409 (1970); *Coolidge* v *New Hampshire*, 403 US 443, 454-455; 91 S Ct 2022; 29 L Ed 2d 564 (1971); *Jones* v *United States*, 357 US 493, 497-498; 78 S Ct 1253; 2 L Ed 2d 1514 (1958); *People* v *White*, 392 Mich 404, 410; 221 NW2d 357 (1974).

The proscription of "unreasonable searches and seizures" and the warrant requirement

> "must be read in light of 'the history that gave rise to the words' — a history of 'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution. * * *' [*United States v Rabinowitz*], 339 US [56], 69 [70 S Ct 430; 94 L Ed 653 (1950)]. The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part. As the Court put it in *McDonald v United States*, 335 US 451 [69 S Ct 191; 93 L Ed 153 (1948)]:
>
> " 'We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the

> arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.' *Id*, at 455-456." *Chimel v California*, 395 US 752, 761; 89 S Ct 2034; 23 L Ed 2d 685 (1969).[11]

In the development of the probable cause and warrant requirements, the United States Supreme Court has recognized three kinds of searches.

The first is the regulatory search, in which inspection is a "crucial part of the regulatory scheme", "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *United States v Biswell*, 406 US 311, 315, 316; 92 S Ct 1593; 32 L Ed 2d 87 (1972).[12] The Court

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[11]*See also Boyd* v *United States*, 116 US 616, 625-627; 6 S Ct 524; 29 L Ed 746 (1886).

[12]Regulatory searches at or near international borders are accorded similar treatment. *See United States* v *Martinez-Fuerte*, ___US ___; 96 S Ct 3074; 49 L Ed 2d 1116 (1976), upholding a warrantless border search at a permanent checkpoint even though there was no reason to believe the vehicle contained an illegal alien.

concluded that "effective regulation of licensed firearm businesses is impractical without resort to a broad inspection power".[13]

Unannounced prophylactic inspections by fire department officials of theatres, department stores and other places where large crowds gather may be necessary to assure that unblocked exits and adequate fire extinguishers are maintained. In light of the public nature of the premises and the relative unintrusiveness of the inspection, a warrant may not be required.

A second kind of search is the so-called administrative search. Where an investigation is to determine the cause of a fire (*e.g.*, faulty wiring, malfunctioning furnace, natural gas leak) and to prevent such fires from occurring or recurring, the need for a warrant and the standard of probable cause are governed by *Camara*, *supra*.

In *Camara*, the United States Supreme Court held that a warrant was required for a routine annual inspection for housing code violations, rejecting the argument that "the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior".

> "[W]e cannot agree that the Fourth Amendment interests at stake in these [administrative] inspection cases are merely 'peripheral.' It is surely anomalous to say that the

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[13]Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 Cal L Rev 1011, 1021 (1973).

individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. * * * [I]nspections of the kind we are here considering do in fact jeopardize 'self-protection' interests of the property owner. Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, again without a warrant. Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence." *Camara*, *supra*, pp. 530-531.

In the companion case of *See v Seattle*, 387 US 541; 87 S Ct 1737; 18 L Ed 2d 943 (1967), the Court applied the *Camara* analysis in holding that a warrant was required for an administrative search of business premises.

The Court reaffirmed *Camara's* requirement of a warrant for an administrative search in *G M Leasing Corp v United States*, — US —; — S Ct —; — L Ed 2d —; 45 USLW 4098; 20 Crim L Rptr 3035 (Jan 12, 1977), where it held a warrantless search by Internal Revenue Service agents, pursuant to a civil statute, unconstitutional.[14]

In *Camara*, the Court also held that probable cause for an administrative search would be determined by a less rigorous standard than in criminal investigations:

> " '[P]robable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, *but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling*." *Camara*, *supra*, p. 538 (emphasis supplied).

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[14] *See, also, Barlow's, Inc* v *Usery*, ___ F Supp ___; 45 USLW 2316 (D Idaho, Dec 30, 1976) (three-judge court), holding a provision in the Occupational Safety and Health Act, 29 USC 657, authorizing the Secretary of Labor "upon presenting appropriate credentials" "to enter without delay and at reasonable times" any business establishment covered by the act, to be unconstitutional.

A warrant for an administrative search could thus be issued pursuant to "reasonable legislative or administrative standards" designed to permit fire officials to conduct investigations of the causes of fires to prevent their occurrence or recurrence.

It is apparent, however, that probable cause (although measured by a reduced standard) and, absent exigent or other special circumstances (prophylactic regulatory search, plain view, consent), a warrant are required even if the investigation of a fire is to determine "the cause of the fire under investigation" and does not "place a person under criminal investigation". The Court of Appeals erred in reasoning to a contrary conclusion.

The third kind of search is the criminal investigation, where officials seek evidence to be used against persons in a criminal prosecution. Such investigations require warrants based on probable cause to believe that evidence of a crime will be found.

The rationale for distinguishing, on the basis of the nature of the search, between regulatory, administrative and criminal searches, is the relative intrusiveness of the search. As stated in *Camara*, "a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for fruits and instrumentalities of crime". *Camara, supra*, p 530. The differing probable cause requirements reflect the greater need to protect against the more extensive and more intrusive criminal investigative search.[15]

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[15] "[A] lesser quantum of evidence is constitutionally required for [administrative] inspections because the search involved is less of an intrusion on personal privacy and dignity than that which generally occurs in the course of criminal investigation. This is a real and meaningful distinction. The concern of the inspector

(continued on next page)

While it may be no easy task under some circumstances to distinguish as a factual matter between an administrative inspection and a criminal investigation, in the instant case the Court is not faced with that task. Having lawfully discovered the plastic containers of flammable liquid and other evidence of arson before the fire was extinguished, Fire Chief See focused his attention on assembling proof of arson and began a criminal investigation.[16] At that point there

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(continued from preceding page)

is directed toward such facilities as the plumbing, heating, ventilation, gas, and electrical systems, and toward the possible accumulation of garbage and debris. These matters may be looked into in a much shorter period of time than it often takes to search for evidence of crime, and certainly no rummaging through the private papers and effects of the householder is required. Nothing is seized. A police search for evidence brings with it 'damage to reputation resulting from an overt manifestation of official suspicion of crime.' A routine inspection that is part of a periodic or area inspection plan does not single out any one person as the object of official suspicion. The search in a criminal investigation is made by armed officers, whose presence may lead to violence, and is perceived by the public as more offensive than that of the inspector. Police searches are conducted at all times of the day and night, while routine inspections are conducted during regular business hours. By their very nature and purpose, police searches usually must be conducted by surprise. In contrast, some inspections programs involve advance notice that the inspector will call on a certain date, and an inspector on his rounds will sometimes agree to return at a more convenient time if the householder so requests. This permits the owner or occupant to remove or conceal anything that might be embarrassing to him." LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 Sup Ct Rev 1, 18-20.

[16] The assistant fire chief testified concerning the searches on the morning following the fire:

"Q. So your purpose in being in the building was solely and exclusively for investigation and gathering of evidence?

"A. Yes, sir.

"Q. You were not there for any purpose of fire fighting?

"A. No, sir, I was not."

was probable cause for issuance of a criminal investigative search warrant.[17]

As the facts of this case illustrate, requiring a warrant would not burden unduly officials whose duty it is to extinguish fires and investigate their causes. Evidence acquired while firefighters are lawfully on the premises putting out the fire is admissible under the plain-view doctrine.[18] The owner of the property will often consent to a search. In other cases, as here, there will be

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[17]The Supreme Court declared in *Katz* v *United States*, 389 US 347, 356-357; 88 S Ct 507; 19 L Ed 2d 576 (1967), that it

> "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been unlawful 'notwithstanding facts unquestionably showing probable cause,' *Agnello* v *United States*, 269 US 20, 33 [46 S Ct 4; 70 L Ed 145 (1925)], for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *', *Wong Sun* v *United States*, 371 US 471, 481-482 [83 S Ct 407; 9 L Ed 2d 441 (1963)]. 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' *United States* v *Jeffers*, 342 US 48, 51 [72 S Ct 93; 96 L Ed 59 (1951)], and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."

[18]*Cardwell* v *Lewis*, 417 US 583; 94 S Ct 2464; 41 L Ed 2d 325 (1974); *Coolidge* v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971).

probable cause to justify the issuance of a search warrant as part of a criminal investigation. If there is insufficient evidence to justify issuance of a warrant as part of a criminal investigation but there is a sufficient basis for an investigation within "reasonable legislative or administrative standards" to determine the cause of the fire, a warrant might issue on that basis.

If there are exigent circumstances, such as reason to believe that the destruction of evidence is imminent or that a further entry of the premises is necessary to prevent the recurrence of the fire, no warrant is required and evidence discovered is admissible.[19]

The exigent circumstances exception does not, however, justify a search after the emergency no longer obtains, and the justification for the exception has ceased to exist. We cannot accept the bald assertions of other courts to the contrary.[20]

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[19]*See, e.g., United States* v *Gargotto*, 510 F2d 409 (CA 6, 1974). The Court declared that where the fire had been recently extinguished and the firefighters were still working in the area where the records were found there were exigent circumstances justifying a warrantless search.

Similarly see Romeo v *Superior Court of Los Angeles County*, 266 Cal App 2d 714; 72 Cal Rptr 430 (1968) (search for hidden fires after explosions was reasonable), *United States* v *Green*, 474 F2d 1385, 1389 (CA 5, 1973) (upholding warrantless search for cause of fire after fire was extinguished, but before fire officials had determined fire's source and were uncertain whether it would recur).

[20]*Bennett* v *Commonwealth*, 212 Va 863, 188 SE2d 215 (1972) (warrantless search occurring day after fire is one that "the law has traditionally upheld in emergency situations"); *People* v *Kulick*, 57 Mich App 126; 225 NW2d 709 (1974) (search the day after fire was only a continuation of search valid at time of fire).

In the instant case there were no exigent circumstances justifying the searches made hours, days or weeks after the fire was extinguished. As expressed in *G M Leasing Corp, supra*, p —: "[t]he agents' own actions * * * in their delay for two days following their first entry, and for more than one day following the observation of materials being moved from the office, before they made the entry during which they seized the records, is sufficient to support the District Court's implicit finding that there were no exigent circumstances in this case".

II

The people argue that the evidence was taken by the fire and police officials pursuant to their statutory duties under MCLA 29.6; MSA 4.559(6), providing:

> "The director or any officer is authorized to investigate and inquire into the cause or origin of a fire occurring in this state resulting in loss of life or damage to property, and for that purpose may enter, without restraint or liability for trespass, any building or premises and inspect the same and the contents and occupancies thereof."

The argument is that because the Legislature has specifically authorized such searches, they are constitutionally sound.

In *Department of Natural Resources v Seaman*, 396 Mich 299, 315; 240 NW2d 206 (1976), we considered a

statute authorizing conservation officers to conduct a search on probable cause without a warrant.[21] We said: "[A] search without a warrant in order to be reasonable under the Fourth Amendment requires more than probable cause — exigent circumstances must also be present. *People v White*, 392 Mich 404; 221 NW2d 357 (1974)." We held that the statute must be construed to preserve its constitutionality, and read it as permitting a warrantless search only where there are exigent circumstances.[22]

We agree with an earlier panel of the Court of Appeals[23] which noted that rather than explicitly authorizing warrantless searches the statute before us is silent on the question. To preserve the constitutionality of the statute a warrant requirement should be read into it. The Supreme Court of Indiana, considering a similar statutory provision, reached the same conclusion. *State v Buxton*, 238 Ind 93; 148 NE2d 547 (1958). Similarly see *G M Leasing Corp v United States*, *supra*.

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[21] MCLA 300.12; MSA 13.1222.

[22] "Although MCLA 300.12; MSA 13.1222 does not mention the requirement of exigent circumstances to justify warrantless searches, it is clear that this provision was enacted to cover those situations in which it is not feasible to obtain a warrant. We are 'duty bound' under the Michigan Constitution to construe a statute in such a way as to uphold its validity. *People* v *Bricker*, 389 Mich 524, 528; 208 NW2d 172 (1973). Consequently, we construe MCLA 300.12; MSA 13.1222 as, *inter alia*, requiring the presence of exigent circumstances before conservation officers are authorized to conduct warrantless searches under the act." *Department of Natural Resources* v *Seaman*, 396 Mich 299, 315; 240 NW2d 206 (1976).

[23] *People* v *Dajnowicz*, 43 Mich App 465; 204 NW2d 281 (1972).

Although post-fire searches made solely for the administrative purpose of determining the cause and source of the fire may properly occur under reasonable guidelines and with *Camara's* reduced standard of probable cause, where the investigation turns to the collection of criminal evidence constitutional requirements cannot be subordinated to a sweeping grant of statutory authority.[24]

Even if the search is administrative, under *Camara* a warrant is required. To justify a warrantless search by labelling it "administrative" (*Bennett v Commonwealth*, 212 Va 863; 188 SE2d 215 [1972]) is therefore erroneous.

While the Legislature is not free to generally except searches and seizures for evidence of arson from the constitutional limitation, it may, as outlined in *Camara*, prescribe, in a narrowly drawn statute, reasonable standards to facilitate the issuance of administrative search warrants to determine the causes of fires to prevent their occurrence or recurrence.

III

The people contend alternatively that there is no reasonable expectation of privacy in property that has been burned. We can accept the premise of that contention, "the Fourth Amendment protects people,

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[24]We are unpersuaded by decisions of courts in other jurisdictions upholding warrantless post-fire searches on the ground that the searches were made pursuant to statutory authority. *Stone* v *Commonwealth*, 418 SW2d 646, 652 (Ky, 1967), *cert den* 390 US 1010; 88 S Ct 1259; 20 L Ed 2d 161 (1968); *State* v *Rees*, 258 Iowa 813; 139 NW2d 406 (1966) (relying on *Frank* v *Maryland*, 359 US 360; 79 S Ct 804; 3 L Ed 2d 877 [1959], which authorized civil inspections without warrants; *Frank* was overruled by *Camara*, *supra*, in 1967).

not places [and that] [w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection", *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967), without accepting the conclusion.

Simply because a person's home or place of business has been burned does not mean that he has no expectation of privacy regarding whatever of his possessions remains. A fire is not an invitation to any or all to enter to satisfy their curiosity or for any other purpose. It does not open the property to public scrutiny. The property continues to be protected by the law from looters and by the law and the Constitution from scrutiny of governmental officials.

Personal papers, family heirlooms and other objects may survive the fire; the owner has a justifiable interest in protecting such property. Although the premises may be uninhabitable, personal possessions may remain undestroyed; unless uninhabitability becomes tantamount to actual abandonment, there may still be a justifiable expectation of privacy.[25]

Some courts have upheld warrantless post-fire searches on the theory that there is no reasonable expectation of privacy in the burned premises[26] or that

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[25]"It seems that the primary defect with 'habitability' as a standard for determining fourth amendment protection where arson investigations are involved is that it should not be the only factor to receive consideration. Other factors which seem to bear on an expectation of privacy are: the amount of personal property remaining on the premises, the extent of destruction caused by the fire, the possibility of danger to the community from the fire and affirmative acts on the part of the individual demonstrating the existence, or lack thereof, of any expectation of privacy. It is also suggested that courts consider these other factors along with 'habitability' in determining whether fire-damaged premises are entitled to fourth amendment protection." Note, *Arson Investigations and the Fourth Amendment*, 30 Wash & Lee L Rev, 133, 145, fn 86 (1973).

[26]*State* v *Murdock*, 160 Mont 95, 103; 500 P2d 387, 391 (1972).

the premises have become uninhabitable.[27] We agree that a warrantless entry would not invade a constitutionally protected interest in privacy if the owner or occupant of the burned premises abandons the property[28] or if the premises are so completely destroyed that there no longer are recognizable objects of personal property. The record does not factually support a conclusion that Tyler had abandoned the fire-damaged premises.

V [sic]

Finally, the people contend that warrantless post-fire searches can be justified by the public interest in preventing fires, saving lives, protecting property and preventing insurance fraud.

There is a public interest in preventing and solving all crimes against persons or property. Constitutionally infirm searches and seizures may not be justified by the generalized, undifferentiated interest in protecting the public safety.

The United States Supreme Court, in distinguishing between regulatory, administrative and criminal investigative searches, has provided a framework for achieving a workable balance between the need for investigation of the causes of fires and protection of the individual's right of privacy.

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[27] *State* v *Vader*, 114 NJ Super 260; 276 A2d 151 (1971).

[28] *State* v *Felger*, 19 Or App 39, 46-47; 526 P2d 611, 615 (1974): "We need not decide whether a warrant was necessary for these subsequent inspections of the premises by fire and police officials because * * * defendant had already abandoned the tenancy".

If there are exigent circumstances, or the evidence is in plain view, no warrant is required. Nor is a warrant required for a prophylactic regulatory inspection of public places.

If there has been a fire, the blaze extinguished and the firefighters have left the premises, a warrant is required to reenter and search the premises, unless there is consent or the premises have been abandoned.

The standard of probable cause will vary depending on the nature of the post-fire search. If the authorities are seeking evidence to be used in a criminal prosecution, the usual standard (probable cause to believe that evidence of a crime will be found) will apply. Where the cause is undetermined, and the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring, an administrative search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards; if evidence of wrongdoing is discovered, it may, of course, be used to establish probable cause for the issuance of a criminal investigative search warrant or in prosecution.

The warrant requirement protects individual privacy from unrestrained exercise of governmental power. Enforcement of the principle that warrantless searches are an exception, justified only by special circumstances, and that warrants may issue only on a determination by a neutral magistrate of probable cause, albeit in this context a varying standard of probable cause, can be harmonized with effective law enforcement.

We hold that the warrantless searches were unconstitutional and that the evidence obtained was therefore inadmissible.

Reversed and remanded for a new trial.

KAVANAGH, C. J., and WILLIAMS and FITZGERALD, JJ., concurred with LEVIN, J.

COLEMAN, J., concurred in the result.

RYAN and MOODY, J., took no part in the decision of this case.

OPINION OF THE COURT OF APPEALS

Appeals from Oakland, Frederick C. Ziem, J. Submitted Divison 2 April 3, 1973, at Lansing. (Docket Nos. 15011, 15012.) Decided November 1, 1973. Leave to appeal granted, 391 Mich 762.

Before: McGregor, P.J., and Quinn and O.Hara,* JJ.

McGregor, P.J. These two arson cases require us to consider once again the constitutional validity of warrantless searches conducted by state fire officials.

The defendants were convicted by a jury of conspiring to burn real property in violation of MCLA 750.157a; MSA 28.354 (1). Defendant Tyler was additionally convicted of burning real property, MCLA 750.73; MSA 28.268, and burning insured property with intent to

*Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, §23 as amended in 1968.

defraud, MCLA 750.75; MSA 28.270. Defendant Tompkins was sentenced to 1-½ to 10 years in prison and Tyler was sentenced to 1-½ to 10 years for each crime, sentences to run concurrently. The offenses were alleged to have occurred on January 21, 1970.

The crucial and dispositive issue on appeal is whether certain evidence was improperly admitted at trial, such evidence having been allegedly obtained by an illegal search and seizure.

Prior to this Court's decision in *People* v *Dajnowicz*, 43 Mich App 465; 204 NW2d 281 (1972), defendants' constitutional assault on the legality of the instant search and seizure would have had little precedential support and been of doubtful merit, in light of past Michigan decisions.[1] However, with the advent of *Dajnowicz*, the issue has acquired a vitality and jurisprudential significance which demands our most careful and thorough consideration.

Our review of the transcript reveals the following pertinent facts concerning the acquisition of the evidence in question.

Between 2 and 2:30 a.m. on January 22, 1970, Chief See of the local fire department arrived at the scene of the fire and conversed with Lieutenant Lawson of the fire department. Although the blaze had been substantially extinguished, fire department equipment was still on the scene and firemen were watering the embers. See and Lawson entered the building through an open door and noted two containers on the floor, one partially filled with gasoline. After spending

[1] *See People* v *Chimovitz*, 237 Mich 247, 250; 211 NW 650, 651 (1927), and *People* v *Bailey*, 42 Mich App 359, 202 NW2d 557 (1972).

approximately one hour in the building, during which time Chief See noted the smell of gasoline, he called Detective Webb of the police department; Webb arrived at the scene at approximately 3:30 a.m. Detective Webb attempted to photograph the interior of the building but was unsuccessful due to the malfunctioning of his camera and the fact that the building was still filled with steam as a result of the firefighting activities. The two men spent approximately ½ hour in the building, when Webb left for the fire station, where he was later joined by See, who brought with him the containers. See and Webb then went to the police station, where the containers and the gasoline were stored. This evidence was admitted at trial, over defendants' Fourth Amendment objections.

Shortly after 8 a.m., January 22, 1970, Assistant Chief Sommerville of the fire department arrived at the scene of the fire with Chief See. Sommerville and See made a cursory examination of the interior of the building which had been almost entirely consumed by the fire. Sommerville then transported See back to the fire station, picked up Detective Webb, and returned to the scene of the fire, arriving between 9 and 9:30 a.m. Further investigation by Sommerville disclosed a linear burn in the carpeting of one room, approximately equal in width to the diameter of a pencil; this burn circled through the room, through a doorway and down a flight of stairs to an exit. On the stairway, pieces of tape were found near the burn mark. Sommerville and Webb left the scene and returned with the tools necessary to remove pieces of carpeting and wood which contained the burn marks. These items were seized between 10 and 11 a.m. on the day of the fire, and were admitted into evidence at trial over defendants' objections. In addition, certain photographs taken by Detective Webb were admitted.

Detective Sergeant Hoffman, from the arson investigation section of the Michigan State Police, took additional pictures of the premises on January 26, 1970; this film was lost in the mail when it was sent to Lansing to be developed. As a result, Hoffman rephotographed the scene on February 16, 1970; these photographs were later transposed to slides and were shown to the jury at trial, without objection. Certain additional evidence gathered by Detective Hoffman on February 16, 1970, gave rise to Fourth Amendment objections; this physical evidence included a piece of fuse found in the building and pieces of glass and other debris. Detective Hoffman testified that this additional physical evidence indicated that the fire had been precipitated by gasoline explosions. This evidence was admitted over objections of defense counsel.

No search warrant was issued in connection with the above investigation. Consent for the numerous searches was never obtained from defendant Tyler, the lessee of the building.

It appears that defendant Tyler had purchased the incorporated furniture businesses, conducted in the building, from one Maynard LaLonde, who leased the building to Tyler on a month-to-month basis. It is conceded that consent had been obtained from Mr. LaLonde for at least a portion of the investigation.

The dispositive issue on these appeals is whether the evidence obtained by fire and police officers from the burned premises without a search warrant was improperly admitted at trial over defendants' objection that it was the product of an unlawful search and seizure. Simply put, do the provisions of US Const, Am IV, and Const 1963, art 1, §11, apply to the investigation of burned premises to determine whether the fire

was the result of arson where some evidence of arson is found during the process of extinguishing the fire? Our negative answer is given with full recognition that it is contrary to *People* v *Dajnowicz*, 43 Mich App 465; 204 NW2d 281 (1972), but in accord with *People* v *Bailey*, 42 Mich App 359; 202 NW2d 557 (1972).

We reject the reasoning and the result reached in *Dajnowicz* for several reasons, the first of which is that the precedent relied on is *Camara* v *Municipal Court*, 387 US 523; 87 S Ct 1727; 18 L Ed 2d 930 (1967), which we find inapplicable to arson investigation cases.

Camara refused to permit the warrantless inspection of his residence in violation of the housing code. This was a crime under the code, and Camara was so charged. He sought a writ of prohibition in the state court to prevent prosecution on the basis that the ordinance authorizing the inspection was unconstitutional. The state courts denied the writ. The Supreme Court reversed, holding that Camara had a constitutional right to insist that the inspectors obtain a search warrant and that he could not be constitutionally convicted for refusing to consent to that inspection.

The principle of *Camara* was extended to places of business by *See* v *Seattle*, 387 US 541; 87 S Ct 1737; 18 L Ed 2d 943 (1967).

The *Dajnowicz* Court recognized that *Camara* dealt with administrative investigations but went on to hold that *Camara* applied to criminal investigations as well, and said:

> "It seems obvious to this Court that if a warrant is required in instances where there is an administrative inspection, a warrant is even more necessary where a person is under criminal investigation." *Dajnowicz*, *supra*, 470-471; 204 NW2d 284.

The fallacy in the language quoted is that the investigation of a fire to determine if arson has been committed does not place a person under criminal investigation. It places the cause of the fire under investigation.

To buttress its holding that *Camara* applied to criminal investigations, the *Dajnowicz* Court cited *State* v *Buxton*, 238 Ind 93; 148 NE2d 547 (1958), a case we find to be inapposite. In *Buxton*, the initial investigation a few days after the fire disclosed no evidence of arson. Subsequent investigation without a warrant was held to be an unreasonable search.

Secondly, state policy as legislatively established by MCLA 29.6; MSA 4.559(6)[2] authorizes investigation of the cause and origin of fires and provides for entry of the premises without restraint. A similar statute was upheld in *State* v *Murdock*, — Mont —; 500 P2d 387 (1972).

Thirdly, as stated in *Bailey*, *supra*, the purpose of the Fourth Amendment is to safeguard privacy and security of individuals against arbitrary invasions by government officials. The privacy and security of defendants were not disturbed by the investigations involved nor were the investigations arbitrary invasions.

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[2]The statute provides: "The commissioner or any officer is authorized to investigate and inquire into the cause or origin of any fire occurring in this state resulting in loss of life or damage to property, and for such purpose may enter, without restraint or liability for trespass, any building or premises and inspect the same and the contents and occupancies thereof."

Fourthly, the proscription of US Const, Am IV, and Mich Const 1963, art 1 §11, is against "unreasonable" searches and seizures. During the extinguishing of the fire, two containers were found, one partially filled with liquid, and the smell of gasoline was noted.' With this knowledge, further investigation, search and seizure were not only reasonable, they were mandated.

On the basis of this analysis of the Fourth Amendment issue involved, we conclude that the trial court did not err in admitting the evidence in question.

We have carefully examined defendants' remaining contentions. None require or justify reversal and all are of insufficient precedential significance to warrant extended discussion here.

Affirmed.

All concurred.

Supreme Court, U.S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1608

STATE OF MICHIGAN,

Petitioner,

v.

LOREN TYLER and ROBERT TOMPKINS,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED MAY 16, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1608

STATE OF MICHIGAN,

Petitioner,

v.

LOREN TYLER and ROBERT TOMPKINS,

Respondents.

RELEVANT DOCKET ENTRIES

1970

July 24. Information filed in Oakland County Circuit Court.

December 23. Motion to suppress evidence filed.

1971

March 8. Motion to suppress evidence denied.

May 3. Jury trial begins.

May 24. Respondents found guilty.

June 15. Respondents sentenced to from 1 1/2 to 10 years in prison.

1973

November 1. Respondents' convictions affirmed by Michigan Court of Appeals.

1977

February 14. Respondents' convictions reversed by Michigan Supreme Court.

May 16. Petition for certiorari filed in this Court.

October 3. Certiorari granted.

REFERENCE TO OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 399 Mich 564; 250 NW2d 467, and is printed at page 17 of the petition for certiorari. The opinion of the Michigan Court of Appeals is reported at 50 Mich App 414; 213 NW2d 221, and is printed at page 36 of the petition.

MOTION IN THE OAKLAND COUNTY CIRCUIT COURT BY LOREN TYLER AND ROBERT TOMPKINS TO SUPPRESS EVIDENCE

(In the Circuit Court
For the County of Oakland)

(Filed December 23, 1970)

NOW COME the defendants Loren Tyler and Robert Tompkins and herewith move this Court to suppress all of the evidence seized by the plaintiff from the premises known as Tyler's Auctions, Inc., 6959 Highland Road, Waterford Township, Michigan, for the following reasons and grounds:

1. That the said evidence was seized from Tyler's Auctions, Inc. without the knowledge, consent or approval of the defendant-occupant, to wit, Loren Tyler.

2. That the said evidence was seized without a search warrant.

3. That the said evidence was seized without a simultaneous arrest being made, for any person whatsover.

4 That the said evidence was seized without there existing probable cause on the part of the officer seizing them to believe that a crime had been committed.

5. That the evidence seized wrongfully and illegally by the plaintiff consists of various plastic containers, alleged gasoline liquid, pieces of fuse, pieces of carpeting, pieces of wood, various bottles, pieces of window plate glass, and various other materials.

WHEREFORE defendants Loren Tyler and Robert Tompkins pray that this Honorable Court will suppress all the evidence seized by the plaintiff from the premises of Tyler's Auctions, Inc., 6959 Highland Road, Waterford Township, Michigan, and suppress all of said evidence against Robert Tompkins and Loren Tyler in any criminal proceedings.

Jesse R. Bacalis & Associates, P.C.
By Jesse R. Bacalis
Attorney for Defendants Loren
Tyler and Robert Tompkins only
1510 Ford Building
Detroit, Michigan 48226
961-3325

December 22, 1970

[NOTICE OF HEARING OMITTED IN PRINTING]

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS

State of Michigan
County of Wayne—ss.

NOW COMES Jesse R. Bacalis, who first being duly sworn, deposes and says as follows:

1. That he is the attorney of record defending Loren Tyler and Robert Tompkins, and that he did handle the examination in the 51st Judicial District Court, for which the subject cause has been bound over for trial in Circuit Court.

2. That during the course of said evidence and testimony the following witnesses admitted taking evidence without a search warrant, and without making a simultaneous arrest at the time of the seizure of said evidence:

A. Chief of the Fire Department, Russell See, on Jan. 22, 1970, seized several plastic containers and the liquid contents thereof.

B. Sgt. Richard Huffman of the Michigan State Police Arson Bureau on January 26, 1970 and again on February 16, 1970 seized pieces of fuse, carpeting, broken pieces of window plate glass, glass bottles and pieces of wood material.

3. That all of said evidence taken was taken without the knowledge, permission or consent of Tyler's Auctions, Inc., or Loren Tyler.

4. That the People have claimed permission and consent from the owner of the building, Mr. Maynard W. LaLonde.

5. Mr. Maynard LaLonde has testified that Mr. Loren Tyler was a tenant on a month-to-month basis during January, 1970 and that he had permission to leave his fire residue material in the said premises after the fire.

Further deponent saith not.

Jesse R. Bacalis

Subscribed and sworn to before me this 22nd day of Dec., 1970.

Linda Jorden

Wayne County Notary
My commission expires: 9-18-73.

AFFIDAVIT OF LOREN TYLER

State of Michigan
County of Wayne—ss.

NOW COMES Loren Tyler, who first being duly sworn, deposes and says:

1. That he is one of the defendants in this cause.

2. That various items of evidence were seized by the Chief of the Fire Department, Russell See, and by Sgt. Huffman of the Michigan State Police Arson Division, and that all such seizures were made without the knowledge, consent or approval of Tyler's Auctions, Inc., and without the knowledge, consent or permission of Loren Tyler.

3. That he has never been presented with a search warrant, and to his best knowledge and information no search warrant has ever been obtained.

4. That the seizure of evidence was made on the morning of the fire, January 22, 1970, and on February 16, 1970, and at neither one of these times was either Loren Tyler or Robert Tompkins simultaneously arrested.

5. That the warrant in this cause was issued April 7, 1970.

Further deponent saith not.

Loren Tyler

Subscribed and sworn to before me on .....

(s) .....

Notary Public, ...
My commission expires: .....

REFERENCE TO SELECTED EXHIBITS

Both parties agree that, of the numerous items of physical evidence admitted at trial, twenty-four (24) photographs are especially relevant to the issues in this case and should be available for the Court's inspection. These photographs have been placed in a separate envelope containing a notation to that effect, as well as the case name and number. The clerk of the Oakland County Circuit Court has been asked to place this envelope at the top of whatever container is used to transmit the record.

EXCERPTS OF TRANSCRIPT OF TRIAL

[Maurice Prieur and George Pisula were tried along with Respondents and were acquitted. The trial attorneys were:

Mr. Cooper: Prosecutor
Mr. Bacalis: Attorney for Tyler and Tompkins
Mr. Bain: Attorney for Prieur
Mr. O'Brien: Attorney for Pisula.]

RUSSELL SEE

Direct Examination

By Mr. Cooper:

(142) * * * Q. And what is your — what do you do once you get to a fire of one of these buildings?

A. Direct the operations in extinguishment of the fire.

Q. Do you have any other duties or responsibilities at these fires?

A. Well, trying to determine the cause and make out all reports.

Q. Uh-huh. All right, now, did you have an occasion to be called to Tyler's Auction on the early morning of January 22nd, of 1970?

A. Yes, I did.

Q. And approximately what time did you arrive at the scene?

A. I believe between 2:00 a.m. and 2:30 a.m.

* * *

(143) Q. Ok. Now, do you — can you describe this night to us, can you tell us what the weather conditions were?

A. The — I believe it was quite cold, I don't recall any snow being on the ground at the time, though.

Q. Ok. And when you first arrived, in front of the building and got out of your staff car, what did you do next, if anything?

A. I met with Lieutenant Lawson.

Q. Did you have a conversation with him?

A. Yes, I did.

(144) Q. And after your conversation with Lieutenant Lawson, what did you do next, if anything?

A. We entered the building.

Q. Now, when you say you entered the building, where did you enter the building, by what means?

A. The front entrance, sir.

Q. The front door?

A. Yes.

Q. And was the door opened or closed when you entered?

A. I believe it was open then.

Q. Did you have to turn the knob to get in or was it already opened and you just walked in?

A. No, it was already opened, we just walked in.

Q. And after you walked in the building, sir, could you describe what you saw when you walked in?

A. Yes, I believe the first thing that was brought to my attention was a couple of plastic containers, laying on the floor of the showroom.

Q. Now, I'll ask you whether or nor, sir, you can orientate yourself to People's exhibit number one, which has been admitted into evidence, and it is a sketch of Tyler's Auction.

A. Is this 59 [Highway M-59] here?

Q. That's the front door.

(145) A. Ok, yes. As I recall, we came in the front door, and over into this area here first, where we first —

Q. All right, now, sir, I want you to look at the exhibit which is on the stand here. All right, now, can you orientate yourself with that diagram?

A. Yes. We walked in the front door, and we turned to our right, and walked into the showroom area.

Q. Now, these plastic containers that you observed, where did you see them sitting?

A. They were laying on the floor.

Q. Whereabouts on the floor?

A. Oh, I believe one was pretty much center of the showroom area, and one just a short distance away.

* * *

(151) Q. Now, sir, as you walked into the building, did you have any difficulty seeing once you got inside the building?

A. The building was still — we had to use portable lights that we carry on our equipment in order to see inside the building. However, the building was still filled with smoke and —

Q. Would there be any steam?

A. Steam, this is what I was trying to say, yes.

Q. What causes the steam, sir?

A. Well, water, applied to heat usually creates the steam, and fills up the building. This is the problem we encounter between this and smoke, yes.

* * *

(153) Q. Now, approximately how long were you in the building that night?

(154) A. Possibly an hour.

Q. Possibly an hour?

A. Yes.

Q. Ok. And after you left the building, where did you go next, if any place?

A. Went directly back to the station when we left the building, and — with this process here.

Q. Uh-huh. Now, sir, after finding these containers, and after having gone through the building and looked around, did you have an opinion as to what caused the fire?

A. I felt it could have been caused possibly from this type of liquid.

Q. Accidentally set, sir?

A. It didn't appear as such, no.

Q. Did you think that possibly it could have been arson?

A. Yes.

Q. And did you ever contact the police concerning this matter?

A. I contacted Detective Webb, immediately.

Q. Now, when did you contact Detective Webb?

A. I think shortly after I arrived.

Q. In other words, you were still at the building, you know, when you contacted Detective Webb?

A. Uh-huh.

(155) Now, while you were at the building, did you see Detective Webb there?

A. Yes, sir.

Q. And after you called him, approximately how much time elapsed before Detective Webb arrived at the scene?

A. Maybe a half hour.

Q. Now, had you picked up People's proposed exhibits number two and three, that being the containers, before Detective Webb arrived?

A. I don't recall, sir. I don't believe so..

Q. Uh-huh. Ok. And to your knowledge, how long did Detective Webb stay there?

A. Probably half, three-quarters of an hour.

Q. Was he there when you left, sir?

A. We left together.

Q. You left together?

A. That's right.

Q. Then you said you went back to the fire department, is that correct?

A. Yes, sir.

Q. Now, did you see Detective Webb back at the fire department?

A. I did.

Q. To your knowledge, was he present when the liquid from one of the (156) containers, two and/or three, proposed exhibit, was poured into People's proposed exhibit number four?

A. I believe so.

Q. Now, sir, after the liquid was taken from the containers and put into number four, at the fire station, what did you do with People's proposed exhibits two, three, and four next, if anything?

A. I believe we put them in paper bags and labeled them, if I'm not mistaken.

Q. And did they remain at the fire department or go to the police department?

A. I believe these were turned over to the detective at that time.

* * *

Cross Examination on the Exhibits

By Mr. Bain:

(157) Q. Now, when they called you, was there any discussion regarding these containers?

A. Outside of the building, when I first got there, yes.

Q. Outside of the building, there was?

A. Yes.

Q. Who was that discussion with?

A. Lieutenant Lawson.

Q. Did he indicate to you he felt there was any foul play of any kind, or might have been?

A. He felt that this was possible.

Q. And subsequent to that time, you entered the building with him to see these containers?

A. Yes.

Q. So that at the point you entered that building, you suspected that there may have been foul play, is that true?

A. On his say-so, yes.

Q. On Lieutenant Lawson's say-so?

A. Yes.

* * *

Cross Examination on the Exhibits

By Mr. Bacalis:

(158) Q. Chief, when you arrived at the building, did you attempt to determine what caused the fire?

A. To determine the cause of the fire?

Q. Did you make an investigation to determine what caused the fire?

A. At that time, to the best of our ability, with artificial lighting, we did.

Q. And you formed an opinion then, as to what caused the fire, based upon what you observed that night when you were there, or that morning?

A. That morning, yes, I did. I felt that this could possibly have been an arson, with that liquid there.

* * *

(160) Q. The question is did you or did you not determine what caused that fire that night, based upon what you could see?

A. That night, I determined that it could possibly have been caused by this liquid.

Q. Now, at that point, you did not have a search warrant, did you?

A. No, sir.

Q. At that point, you did not have permission to take anything from the building, is that correct?

A. Well, we were — the department had never left the building, sir, and it's our duty or my duty, I should say, as Chief, to try to preserve any evidence that may lead to — I feel could be suspicion, to lead to foul play.

Q. But that isn't what I asked you, was it?

A. Would you repeat your —

Q. The question was, you didn't have the consent or permission from anyone other than this authority you thought you had?

(161) A. Right, yes, sir.

Q. To take objects from this building, is that correct?

A. That's correct.

Mr. Bacalis: I object to the evidence on the ground, no proper foundation has been laid, and an illegal search.

The Court: Objection overruled, exhibits two, three and four are received in evidence.

* * *

Cross Examination

By Mr. Bacalis:

(162) Q. Chief, was the fire completely out when you arrived?

A. Yes, most of it. I mean they were — when I arrived they were just watering down smoldering embers.

* * *

(168) Q. How many times were you there at that building?

A. How many times was I there?

Q. Yes?

A. Twice, I believe.

Q. That would be the early morning of the 22nd, is that right?

A. The morning of the fire.

Q. Thursday, the 22nd of January?

A. Yes.

Q. Early morning, 3:00 a.m., right?

A. Right.

Q. When was the next time you were there?

A. Next time I was there, the following forenoon, with the Fire Marshall or Assistant Chief.

Q. Would that be Thursday, the same day?

(169) A. Same day, yes.

Q. Total of how much time was spent there?

A. (No answer)

Q. In your examination?

A. My examination was that evening, or that morning of the fire. The next day, the Assistant Chief made the other investigations.

Q. My question was directed to you, personally, how much time did you spend on the scene?

A. Approximately two hours.

* * *

Q. My question was with reference to investigation, other than extracting exhibits two and three, what did you do by way of investigation?

A. Looked throughout the rest of the building to see if there was any further evidence, to determine what the cause of the fire was.

* * *

(171) *Re-Direct Examination*

By Mr. Cooper:

Q. After you thought this possibly may be an arson, Chief, you indicated that you called the police. Why did you call the police?

A. To take pictures.

Q. Is it their duty to investigate, after you make this ascertation, or that it possibly could be?

A. Yes.

Q. You didn't investigate with the police department?

A. No.

* * *

DONALD SOMERVILLE

Direct Examination

By Mr. Cooper:

(173) Q. All right. Now, sir, did you happen to be at Tyler's Auction on January 22, 1970?

(174) A. Yes, sir, I was.

Q. And approximately what time did you arrive at Tyler's Auction?

A. Shortly after 8:00 a.m.

Q. 8:00 a.m. in the morning?

A. Yes, sir.

Q. And was anyone with you when you arrived at 8:00 a.m.?

A. Yes, sir, Chief Russell See of the Waterford Fire Department.

Q. Now, why did you have an occasion to go to Tyler's Auction on the morning in question?

A. Part of my job is to determine the cause and origin of all fires that occur within the Township.

Q. And that was the reason then you were there on the morning in question?

A. Yes, sir.

Q. Were you there at anyone's direction?

A. Yes, sir, I was there, of course, at the Chief's direction. When I arrived at work that morning, he advised me of the fire that had occurred the night before.

Q. All right. Now, at that time, did you discuss anything with the Chief? Prior to the time that you went to the fire or the place of the fire?

A. I cannot recall, sir.

Q. At the time that you arrived at Tyler's Auction, what did you (175) do, after you arrived, if anything?

A. Well, when we first arrived, I just entered the building, and, with the Chief, made a cursory examination of the damage that had been caused by the fire.

Q. Ok, now, you recall, for example, sir, what door you entered?

A. Yes, sir, we entered the front door, the main door of the building.

Q. Was that door locked when you arrived?

A. Yes, sir.

Q. You just walked right in?

A. Yes, sir.

Q. Now, sir, do you recall whether or not there's any windows in the front of that building?

A. Yes, there was.

Q. And do you remember how many windows there are?

A. No, I can't recall, off-hand, there would be either two or three large windows.

Q. And do you recall whether or not these — what the status of these windows were?

A. These windows were broken out.

* * *

(177) Q. All right. Now, when you walk into this display room, what did you observe, if anything?

A. I observed that the interior of the building and all the furnishings and fixtures had been almost completely consumed by fire.

Q. Uh-huh. And did you see the remnants of anything in that particular show area?

A. Yes, sir, there were metal parts of beds, tables, chairs; but this was about all that was left that was — that which was metal.

Q. Uh-huh, now, how about the — did you ascertain in the show area what the ceiling — what type of ceiling was there?

A. It had had, apparently had had a drop ceiling, an accoustical type ceiling that had fallen down, had been burned or had been involved in the fire and had been dropped from the ceiling onto the floor.

Q. And above that type of ceiling, what type of ceiling was there?

A. It was, as I recall, would have been steel structure, metal deck.

(178) Q. And how was that when you observed it?

A. The steel was twisted, the girders, some of the support beams and so forth had all been very badly damaged by heat and fire.

* * *

(179) Q. Uh-huh. And after making these observations, what did you do next, if anything?

A. I think it was at that point that I returned to the station with the Chief, and then I picked up Detective Webb from the Waterford Police Department, who had been called to the scene the night before, to take some photographs of the damage, as I recall, upon the request of the fire chief. I picked up Detective Webb, and then we returned to the scene at which time I went into a more detailed examination of the building.

Q. Now, after you arrived back, approximately what time was this, sir?

A. This would have been in the area of 9:00 a.m. or 9:30 a.m.

Q. In the morning?

A. In the morning.

Q. All right. And at that time, Jim Webb, from the Waterford Township Police Department was with you, is that correct?

A. Yes, sir.

Q. By what means did you enter the building?

A. Once again, we walked in the front door.

* * *

(184) Q. All right. You may return to your seat. Now, after you made those observations, what did you do next, if anything?

A. I believe it was at that point that Detective Webb and I again left the scene, in order to get tools and materials needed to pick up the evidence that I felt was necessary to retrieve and keep.

Q. And where did you go?

A. We went to the Water Department, Waterford Township Water (185) Department, and procured a chain saw.

Q. Anything else?

A. We went to a — an insurance repair contractor, at which point I borrowed — be like a cutting knife, you cut tile or something with.

Q. Uh-huh, and what did you do next?

A. Then we returned to the scene, at which point I proceeded to cut out, with the chain saw and the knife, the pieces of carpeting that had the material imbedded in it. I cut out the pieces of stairway, the door frame, and then I also cut out some more pieces of carpeting that were located in the same room, but more towards the front of the building, that were saturated with some type of a liquid that smelled very strongly of gasoline.

Q. Ok, now, you indicated, sir, that you took certain things out, is that correct?

A. Yes, sir.

* * *

(188) Q. I now hand you what purports to be People's proposed exhibits, six, seven, eight, nine, ten, and 11, and I would ask you to look at these and see if you can identify same?

A. Yes, sir, once again, my handwriting, my rank and initials, and the date in question. The carpeting taken from the parts of the building, the northwest front part of the building, as written on here.

Q. When and where did they come into your possession, sir?

A. On the date of January the 22nd.

Q. And approximately what time?

A. Around the hours of, I would say between 10:00 and 11:00 a.m., the morning of January 22nd.

* * *

Cross Examination on the Exhibits

By Mr. Bain:

(190) Q. This was the morning after the fire?

A. Yes, sir.

Q. When you returned, was anyone else present in the store?

A. No, sir, not when I came back in the morning.

Q. Who was with you?

A. The first time, was the Chief, second time Detective Webb.

Q. Did you obtain permission from Mr. Tyler to go into the building?

A. No, sir, Mr. Tyler was out of town at that time.

Q. Did you make any effort to contact him?

A. I — no, I did not.

Q. Did you have a search warrant at that time?

A. No, sir.

Q. At any time, to the best of your knowledge, was a search warrant obtained to gain any of the evidence in this case?

A. No, sir.

Mr. Bain: I'll object, based on (191) illegal search and seizure.

The Court: Mr. O'Brien?

Mr. O'Brien: I have nothing further to urge, your Honor.

The Court: Mr. Bacalis?

Mr. Bacalis: May I have a couple questions, your Honor?

The Court: You may.

Cross Examination on the Exhibits

By Mr. Bacalis:

Q. Mr. Sommerville, when you went into the store, the store was not open for business?

A. That's right, sir.

Q. It was closed, obviously, the public was not invited, is that correct?

A. Yes, sir.

Q. Was it locked?

A. No, sir.

Q. How did you gain access?

A. The front door was open.

Q. I see, at that point, did you contact the owner of the building?

A. No, sir, I did not.

Q. You didn't try to get permission to go on the premises from either the landlord or the tenant, is that correct?

(192) A. I was advised — at that point, I did not know who the landlord was and I was advised the tenant was in Florida.

Q. My question was, you didn't get permission from either the landlord or the tenant?

A. No, sir.

Q. The fire was completely extinguished when you were there?

A. Yes, sir.

Q. We're talking now, — what time were you there Thursday morning?

A. It was about 8:00 o'clock or shortly thereafter.

Q. So your purpose in being in the building was solely and exclusively for investigation and gathering of evidence?

A. Yes, sir.

Q. You were not there for any purpose of fire fighting?

A. No, sir, I was not.

Mr. Bacalis: My objection to the evidence, your Honor, is on the same basis. It is an illegal search and seizure.

The Court: Objection overruled. Exhibits five, six, seven, eight, nine, ten and 11 are received in evidence.

* * *

Direct Examination

By Mr. Cooper (Continued):

(198) Q. And where did you go from that point?

A. That point, then I went on into the large area, sales room, display area, back into the building there. And proceeded to go over that area, very thoroughly, all the debris, the rubble and so forth, that was there, looking for any other signs or evidence that showed how this fire was caused.

* * *

Cross Examination on the Exhibit

By Mr. Bacalis:

(206) Q. Mr. Somerville, you didn't come to this scene until after the fire was extinguished, is that correct?

A. That's correct.

Q. Is it also true that there was no guard placed on the premises to keep the premises exactly the way the fire department left it?

A. There was no guard, no, sir.

Q. So there's a period of time then when these premises are totally unattended and the doors are open, right?

A. Right.

Q. Can you tell this Court how long the premises were unguarded with the doors open?

(207) A. Approximately for hours.

Q. And that would be from what time to what time?

A. About 4:00 a.m. till 8:00 a.m.

Q. Now, you have no way of knowing whether the premises, when you saw them, at approximately 8:00 or 9:00 a.m. on January the 22nd, were exactly the same as the firemen left them, is that true?

A. That's true.

* * *

JAMES WEBB

Direct Examination

By Mr. Cooper:

(244) Q. Approximately what time did you arrive at the scene?

A. This would have been some time after 3:30.

(245) Q. And what did you observe when you arrived at Tyler's Auction?

A. I observed firemen and I believe a fire truck, at Tyler's Auction. And could observe that there had been a fire there.

Q. Uh-huh. And what was the first thing that you did, if you can recall?

A. I believe, first thing I did was talk to Chief See.

Q. Uh-huh, and do you recall where this conversation took place?

A. I believe this was in front of the building.

Q. Front of the building, and after that conversation, what did you do next, if anything?

A. I believe I went inside, at this time, with Chief See.

Q. You went inside the building?

A. Yes, sir.

Q. Do you recall how you gained entrance to the building on that occasion?

A. Through the front entrance.

Q. Now, did you have any trouble getting through the front door?

A. No, sir, it was open.

Q. Was the front door intact?

A. The doors were intact, yes.

Q. After you went into the building, what happened next, if anything?

A. Chief See led me into the building on the north — excuse me, the (246) room on the northwest side.

Q. Ok, that would be like a showroom, here?

A. Yes.

Q. Where "t-i-o-n" is in auction, on the northwest corner?

A. Yes.

Q. And what happened after you walked into that room, if anything?

A. When I walked in that room, I observed two plastic containers.

Q. And where were they situated?

A. One was near the entrance of that room on the — be the east side of that room, near the door. And the other was across the room, approximately 15 feet from it.

Q. Ok. And after you observed these containers, what did you do next, if anything?

A. I'm not sure, at that time if I had my camera with me or if I went outside to get it, but I did take pictures.

Q. When you say take pictures, you took pictures of the containers?

A. Yes.

Q. And what happened next, if anything?

A. I was then led into the — what is called the gallery on this chart, by Chief See, to take pictures in there.

Q. When you say the gallery, what are you referring to?

A. Be the northeast side of the building, of this particular room, in there, another showroom.

(247) Q. Now, what was the condition of the building itself, as you entered it? What did you observe?

A. I observed the room completely gutted, this particular area.

Q. Was there any traces of fire or —

A. There was alot of steam. In fact, there was so much steam that — at the point of the stage area there, I couldn't see past that point.

Q. You mean into the — looking south into the building?

A. Yes, sir.

Q. And what did you do in the gallery room, if anything?

A. I took a few pictures, at that point, in the gallery.

Q. All right, and what did you do next, if anything?

A. Because of the steam, I advised Chief See that I could not take any more pictures.

Q. And what happened after that, if anything?

A. At that point, I advised Chief See to gather up the — whatever evidence he had and we'd take it to the police station.

Q. Ok, and what did you observe Chief See do, if anything?

A. I did not observe him at that time, I believe I left the building.

Q. Ok, and where did you go then?

A. I proceeded to the fire station. It was cold that night, and I had a cup of coffee.

Q. Ok, now, approximately what time did you leave Tyler's (248) Auction then, that night or that morning?

A. It would have been right around 4:00 o'clock.

Q. 4:00 o'clock in the morning?

A. Yes, sir.

Q. And what happened after you arrived at the fire station, if anything?

A. Chief See — I met Chief See there and he came in and obtained a plastic container.

Q. And what happened next?

A. At this time, we both proceeded to the Waterford Township Police Station.

* * *

(251) Q. Now, after you left the Tyler's Auction, at approximately 4:00 a.m., did you have an occasion to return back to the building?

A. Yes, sir, I did.

Q. And what time did you return back to the building, if you can recall?

A. This would have been shortly after 9:00 o'clock.

Q. 9:00 a.m.?

A. Yes, sir.

Q. That would be when?

A. The same morning of the 22nd.

Q. Same morning of the 22nd. And was anyone with you when you returned?

A. Assistant Chief Don Somerville.

Q. And where did you meet Lieutenant Somerville? If you can remember?

A. I believe he came to the station and picked me up. We went in his vehicle.

Q. Ok. And after you arrived at Tyler's Auction, what was the first thing that you did, if you can recall?

A. I went in with Chief Somerville, and made a visual check of the room at the northwest corner.

Q. The northwest corner, that was the corner in which the two (252) containers were found?

A. Yes, sir.

Q. How long were you in there, approximately?

A. I would say we probably weren't there more than ten or 15 minutes.

Q. Ok, and what happened next, after you went into that room, if anything?

A. We found things that we belived were pertinent, and we did not have tools to obtain these items, so we left the building, went to the Water Department, obtained a chain saw, and a cutting knife.

Q. Ok, now, when you say that you saw things that you deemed pertinent, what was that?

A. Found burn marks in the carpet, which we could not see earlier that morning, because of the heat, steam, and the darkness of the building. We also observed pieces of tape, with burn marks, on the stairway.

Q. And approximately, then, what time did you return back to the building?

A. I would say somewheres near 10:00 o'clock.

Q. 10:00 o'clock in the morning?

A. Yes, sir.

Q. And what happened after you arrived back the second time?

A. Chief Somerville proceeded to cut pieces of carpet out and (253) also cut the stairways out.

Q. And did you observe him do this?

A. Yes, sir, I did.

Q. What were you doing at that time, if anything?

A. About all I was doing is assisting him as he cut the pieces out. I would take them and put them in containers.

Mr. Bacalis: Excuse me, would you raise your voice, I didn't hear you.

A. I'm sorry. I was assisting him. I would take the pieces he cut out and put them in containers.

Q. Now, where was there wood taken from, Detective Webb?

A. The wood was taken from the stairway, leading from the northwest room, to the basement.

* * *

(255) Q. Approximately how long were you in the building on that date?

A. I'd say approximately 45 minutes to an hour.

Q. Ok, and now, what happened to the carpeting, and to the wood and — that was taken from the building?

A. This was all brought to the Waterford Township Police Station and marked and placed in the property room.

* * *

(256) Q. After those exhibits came into your possession, what did you do with them next, if anything?

A. Friday, these — they were taken to Lansing, and turned over to Dr. Krupp, at the Michigan State Health Lab.

* * *

(257) Q. All right, now, to your knowledge, when was Lieutenant, or Sergeant Hoffman called into the case?

A. This would have been the Monday following the fire. This would have been on the 26th of January.

Q. Uh-huh, and when did you first see Detective Hoffman?

A. I believe it was that morning.

Q. Uh-huh, and where did you see him at?

A. I don't recall if I met with him at the police station or the fire department.

Q. Now, prior to the time that you met with Sergeant Hoffman, had you determined who was the owner of the building?

A. I don't believe so.

Q. Did you determine who was the occupants of the building?

A. Yes, sir, I knew who the occupant was.

Q. And that was who?

A. Mr. Loren Tyler.

Q. Now, did you make any attempts to contact Mr. Tyler?

A. (No answer)

Q. After the fire?

A. I'm not sure, but I believe I had been told that he was out of town at this time.

* * *

(260) Q. And can you tell us what was in that closet, if anything?

A. There were a few papers and I believe some checks, possibly check books, I believe, laying on the floor. Not much in the closet, other than that.

Q. Ok. Now, did you ever ascertain what these boxes were?

(261) A. Yes, sir, those were the records that Mr. Maynard LeLonde had kept of the business previous to its transfer to Mr. Tyler.

* * *

Cross-Examination

By Mr. Bacalis:

(287) Q. All right, did you check this door which is shown as being the door, which shows as being the door in back of the display room, when you were there?

A. I recall going through the door, but that's all.

Q. Can you tell the jury how that door is locked or secured?

A. I don't recall, sir.

Q. Can you tell the jury whether or not it was locked or secured?

(288) Mr. Cooper: At what point in time?

Mr. Bacalis: At any point, whenever he saw it.

A. It was later secured, yes.

Q. You can't tell us when?

A. Yes.

Q. When was that?

A. 22nd, when it was boarded up.

Q. But when you were there, you were there twice on the 22nd, right?

A. Yes, sir.

Q. And you can't tell us how you found it when you first arrived on the 22nd, right?

A. The first time I arrived, I did not see it.

Q. Now, that's at 3:00 o'clock in the morning, right?

A. Approximately 3:30, yes, sir.

Q. You got some kind of artificial light to go through the building, right?

A. The firemen did, yes, sir.

Q. Did you use that artificial light?

A. No, sir.

Q. How did you see to keep from stumbling in the dark?

A. They had the rooms lit up for us.

* * *

Re-Cross Examination

(324) By Mr. O'Brien:

Q. Detective Webb, January 21st of 1970, I guess was the time of this fire, is that correct?

A. Yes, sir.

Q. The evening of that date. And you became actively involved in the investigation that evening, and the following morning, January 22nd?

A. It was on the following morning, yes, sir.

Q. Along about some time that morning or that next day, your attention was sufficiently taken by what you found at that scene, because you wanted to continue regular police officer's investigation, is that correct?

A. Would you repeat that, please, sir?

Q. You saw sufficient facts and circumstances to cause you to want to continue detective-type investigation, as of January 21, 1970.

A. Yes sir.

Q. Then from January the 21st, you went through the regular investigative procedures one would follow in a case such as this one?

(325) A. At this time, I did not know the regular investigative procedure. I did not investigate arson cases —

Q. You did your thing, however?

A. I did it with Sergeant Hoffman, yes, sir.

* * *

OSCAR FRISCH

Direct Examination

By Mr. Cooper:

(384) Q. And how long did you work for Mr. Tompkins?

A. For a period of about four or five months.

Q. And what did you do for him?

A. I made deliveries for him and did odd jobs around his house and around his store, also.

Q. His store, what do you mean?

A. That was Tyler's Auction, on M-59.

Q. During the course of your employment, would you ever have to go to Tyler's Auction?

A. Yes, sir.

Q. What would you do there?

A. I would clean up around the store, make deliveries and transfer furniture, from time to time, to warehouses or to the other stores.

Q. Now, did you have an occasion to be at Tyler's Auction on January the 18th, 1970, that would have been the Sunday before the fire?

A. Yes, sir, I did.

Q. And what were you doing on that particular day, there at Tyler's Auction?

A. I was moving furniture around for the auction that they were having at that time in the store, and helping them straighten (385) up. I was a spotter for them, also. Whenever they needed a higher bid, they'd look at me and I'd bid.

Q. Who was the auctioneer at that time?

A. That was Mr. Tyler and Mr. Hall, as I remember it.

Q. And other than Mr. Hall and Mr. Tyler, was there anyone else there that Sunday, assisting with the auction?

A. Yes, Mr. Tompkins was there, the Tompkins and Tyler children, and Mrs. Tyler, and myself.

Q. Now, did you have an occasion to be there on Monday, January the 19th?

A. Yes, sir, I did.

Q. And approximately what time did you arrive at Tyler's Auction on that date?

A. That was in the morning, as I remember, about, I would say, about 9:00 o'clock, 10:00 o'clock, maybe.

Q. And how did you happen to arrive on this particular morning?

A. We brought a truck load of furniture in — or used furniture.

The Court: Mr. Cooper, what was the date we're talking about?

Mr. Cooper: Monday, January the 19th.

Q. And when you say we arrived at Tyler's Auction, who are you referring to?

(386) A. Mr. Tyler, Mr. Tompkins and myself, sir.

Q. And did you see anyone else there on that Monday?

A. Yes, I did, now that I think of it. I am afraid that I may have mixed up a date here, so —

Q. Well, the date I'm referring to is Monday, January the 19th, the day after the auction.

A. Uh-huh.

Q. Do you remember being there on that particular date?

A. Yes, I do.

Q. And who was present when you were there, at the outset?

A. Oh, just Mr. Tompkins and Mr. Tyler.

Q. All right. Now, on that day, did you see any furniture being taken out of the store?

A. On Monday? Yes, sir, there was. Mr. Hall came later and took some furniture out of the store, lamps and what have you.

Q. And did you see anyone else there, other than Mr. Hall?

A. There was one or two other people there, but right off-hand, I can't recall who now.

Q. Do you recall what Mr. Hall was taking out of the auction on that date?

A. Yes, sir, he was taking lamps he had purchased there. He purchased every lamp in the store, and was putting them in his truck.

(387) Q. And approximately how long was Mr. Hall there, if you can remember or recall?

A. Well, towards noon, even later in the day, because he had quite a bit to take out.

Q. To your knowledge, how many loads of furniture did Mr. Hall take out?

A. If I remember correctly, I believe he was using two trucks, and he made at least two loads apiece with these trucks, taking, you know, small furniture and lamps and what have you, out.

Q. Other than Mr. Hall taking furniture out of Tyler's Auction on that Monday, did anyone else take any furniture out, to your knowwledge?

A. There were some people that picked up numerous small items that had been sold at the auction the previous day. And I believe — let me think, I think I made a delivery that date myself, from that store, if I remember correctly.

Q. Now, did you assist in taking any furniture out of that store on that date?

A. Yes, I did.

Q. What type of furniture were you moving out, on that Monday?

A. It was new furniture and bedroom suites that hadn't been sold that previous date, that were to be taken to the store in Flint to be put in storage.

(388) Q. What type of truck were you using on that Monday?

A. We were using two trucks, a '66 GMC pick-up, with a box on the back which was Robert Tompkins' truck. And Mr. Tyler's truck is a Dodge, straight van, about an 18 or 20-foot van.

Q. When you say you placed some furniture on a truck, how much furniture did you place on these trucks?

A. Well, we filled them up.

Q. And after you filled the trucks up, to your knowledge, where were they taken next?

A. As I said, most of the furniture that remained there was taken up to the store in Flint and put in the storeroom in that store. Some of the furniture was taken to an aluminum barn that Mr. Tompkins had on his property.

Q. To your knowledge, was there any storage area around the airport?

A. Yes, there was. At the old airport, Ferry Service.

Q. And to your knowledge, was any furniture taken there?

A. Yes, sir, there were chairs and let me see, I think one or two sofas, possibly three.

Q. Can you tell us how much furniture was in the auction then, Monday, the last time that you were there?

A. Oh, well, when we left the auction that evening, it was quite late in the evening, there was nothing left that was of any significant value. Probably, I would say, at the most, four (389) pieces, five pieces of new furniture.

Q. And did you have an occasion to come back again to Tyler's Auction?

A. Tuesday morning, following day, yes, I did.

Q. And what time did you arrive, if you remember?

A. Somewhere around, as I remember correctly, somewhere around 8:00 or 9:00 o'clock.

A. And whom did you arrive with or how did you arrive?

A. That morning, I came with Mr. Tompkins and Mr. Tyler in their — oh, excuse me —

Q. Where did you meet them at?

A. I met them at Mr. Tompkins' house.

Q. And how did you get from Tompkins' house to Tyler's Auction?

A. If I remember correctly, Mr. Tyler drove his white Ford pick-up with a box on it. And Mr. Tompkins and I went in the Dodge van that belonged to Mr. Tyler.

Q. What was the status of the truck you were in at the time you drove it from — or was in it from the time it was being driven from Tompkins' house to the store?

A. It was full of old junk furniture that had been loaded on the previous night.

Q. And, after you arrived at Tyler's Auction, what happened next, if anything?

(390) A. Well, we backed the truck up to the far back door on the side, and unloaded the truck in the store.

Q. Now, when you say the far back door, is this the door you're referring to, sir?

A. Yes, it is.

Q. That would be the door on the west side, the southern most part of the building?

A. Yes.

Q. Now, what kind of furniture was on that truck?

A. There were some old — I forget how many, right off, about six or seven old t.v. sets, that had been in the warehouse that Mr. Tompkins had, that were no longer operable. Some old over-stuffed furniture that was very, very old, torn and springs poking through. And old dinette sets that were broken and rather dilapidated and mis-used. My gosh, some old mattresses that were torn, and threaded, kind of moth-eaten.

Q. Now, what time did you unload this furniture, to the best of your recollection, on that Tuesday?

A. I would venture to say about 9:30 or 10:00 o'clock.

Q. Now, who was unloading the furniture?

A. All three of us, Mr. Tompkins, Mr. Tyler, and myself.

Q. Now, at that time, did you have a conversation with both or either of Mr. Tompkins and Mr. Tyler?

(391) A. Oh, yes, we discussed numerous things at that time.

Q. Now, who was present at this conversation?

A. Mr. Tompkins and Mr. Tyler, and myself.

Q. All right, and the conversation took place where?

A. Inside the store, and inside the truck, as we were unloading the furniture.

Q. Ok, and this would be on Tuesday then, is that correct?

A. Yes, sir, Tuesday morning.

Q. Now, you indicated that you had a conversation with Mr. Tyler?

A. Yes, I did.

Q. And do you see Mr. Tyler in the courtroom today?

A. Yes, sir, I do.

Q. Would you please point him out?

A. Yes, sir, that's Mr. Tyler, next to you, there.

Q. The gentleman to my left?

A. Yes, sir.

Mr. Cooper: Your Honor, would the record reflect that this witness has identified the respondent, Loren Tyler?

The Court: Any objection?

Mr. Bacalis: No objection.

The Court: The record may so indicate.

Q. And, now, specifically, to the best of your recollection, what (392) did Mr. Tyler say?

Mr. Bain: Objection.

Mr. O'Brien: Same objection, your Honor.

The Court: The jury will be instructed, in view of the fact that the other defendants were not present, this would not be admissible against any defendant who is not present. But you may take an answer, it will only be binding upon the person making the statement.

A. Mr. Tyler and myself were joking about the furniture and how dilapidated it was, how old it was. He was stating, for instance, that Mr. Lincoln had slept in this chair, and on this sofa, which I remember the statement because it was rather funny. And that none of the t.v.'s worked well. He instructed me to put the t.v.'s along the west wall towards the back of the store and line them up. And also instructed me to put mattresses on top of old chairs and tables and sofas, so — as he said — so that they would burn better.

Q. Now, was this the first time that you had an inkling that there was going to be a fire?

A. Yes, sir — well, no, sir, it wasn't the first time, but it was the first time that I felt quite confident that there would be.

Q. Well, when was the first time you ever heard it discussed?

(393) A. It was long before Christmas of — well, '69.

Q. And who was present when you first became aware that something might happen?

A. Just Mr. Tompkins.

Q. And, to the best of your knowledge, where did that conversation take place?

A. If I remember correctly, sir, we were riding in his car at the time, and he brought up the fact that there may be —

Mr. Bain: Objection.

Mr. O'Brien: Same objection, your Honor.

The Court: Objection sustained. These three respondents not being present, it would not be binding against anyone other than the person who made it. When is this supposed to have been, please?

Mr. Cooper: Before Christmas, your Honor, 1969.

The Court: It would be binding only as to the person who stated it, or in his presence.

Q. What did Mr. Tompkins tell you on that occasion?

A. He stated that there would be something that would happen after the first of the year that would be of great significance, and requested that I pick up old furniture and cardboard boxes and (394) things of that nature, rather made a game out of it with me, which he was prone to do.

Q. Ok, after that conversation, and before the Tuesday that we were talking about, did you have any further conversation with either Mr. Tyler and/or Mr. Tompkins concerning the fire?

A. I beg your pardon, sir, could you repeat that?

Q. After Mr. Tompkins mentioned that something was going to happen?

A. Yes, sir.

Q. And before the Tuesday that you were unloading the furniture, between those two times, did you have any further conversation with either Mr. Tyler and/fifi Mr. Tompkins, concerning the fire?

A. Yes, I did.

Q. Now, when did that conversation or conversations, take place?

A. The exact dates, really would escape me, on this subject, because Mr. Tyler hadn't mentioned it until that date to me, but Mr. Tompkins did, occasionally. As a matter of fact, later on, I was trying to guess what was going to happen. And he mentioned to me that there would possibly be a fire in the store.

Mr. Bain: I'm going to object to this conversation.

The Court: Same ruling, it is only binding upon the person making the statement.

(395) Mr. Bacalis: Your Honor, I'd request counsel to establish when this so-called conversation took place.

The Court: Establish when this took place.

Q. To the best of your knowledge, when did this conversation you just got done testifying to take place?

A. There was a conversation, one in particular, I recall, that was shortly after Christmas, possibly a week, that Mr. Tompkins and myself discussed this possible fire, because I was curious as to why he wanted all this stuff. And he said possibly there would be a fire, and that I should bring in as many old boxes and paper and what have you, as I could.

Q. Now, you indicated that you had a conversation with Mr. Tyler on the Tuesday before the fire?

A. Yes, sir.

Q. Did you have a conversation with Mr. Tompkins?

A. Yes, sir.

Q. On Tuesday before the fire?

A. Yes, sir, I did.

Q. And was it the same time you had the conversation with Mr. Tyler?

A. Yes, sir, it was.

Q. What did Mr. Tompkins say to you, if anything?

(396) Mr. O'Brien: Same objection, your Honor.

Mr. Bain: Same objection.

The Court: Same ruling, binding only on the person making the statement, not on the other defendants.

A. Mr. Tompkins also was joking about the placing of the furniture and the age of the furniture, that it was so old and dilapidated. And Mr. Tompkins, at that time, discussed some cardboard boxes that were in the back, with alot of paper in them, that we had brought in. And we also, at this time, discussed the fact I hadn't brought in a number of boxes that he felt I should have. He was quite disappointed with me over that, as I remember.

Q. Where was the cardboard that you went and got?

A. There was some cardboard outside, and there was some at the back of the store, piled against the wall. Some of the stuff outside we couldn't use, it was wet. I believe it had snowed that day, or it was damp, anyway.

Q. Now, was there any conversation on that Tuesday as to when the fire was to take place?

A. Yes, there was. Mr. Tompkins and Mr. Tyler both informed me that it would happen — well, the proceding day, on Wednesday.

Q. And what was this conversation —

Mr. Bacalis: Your Honor please, just (397) for the purpose of the record, I think it would be only fair that the witness tell the jury exactly what he claims the witness said, rather than characterize what he said.

The Court: Objection sustained.

Q. What, specifically, did Mr. Tyler tell you, on that Tuesday?

Mr. O'Brien: If the Court please, must we continue our objections?

The Court: No, the jury should understand that these conversations are binding only on the person who made the statement or the persons who were present and heard them. The other defendants not being present, this is not binding on these defendants. You may proceed.

A. As best as I can remember the conversation, I had inquired as to how soon this fire would take place or this supposed fire. And they told me that it would be Wednesday.

Q. Now, can you remember exactly who said what?

A. Not right off, I can't be certain as to which one stated that fact.

Q. All right. Now, was there any indication that Mr. Tyler was going on vacation?

A. Yes, sir, there was.

Q. When did this conversation come up?

A. The first time I recall hearing about Mr. Tyler going on vacation (398) was perhaps a week prior to the fire. And —

Q. What was the circumstances about, you know, that led up to you finding out that he was going on vacation?

A. Mr. Tompkins and I were — he had been discussing, again, the fire, and what was to take place. And he stated that Mr. Tyler would leave for Florida so things would not be too suspicious, as he put it, if I remember correctly.

Q. When did that conversation take place?

A. Like I say, about a week before the fire.

Q. Now, going back to Monday, do you recall any television sets being moved out on that Monday?

A. The Court: Now, for the record, what Monday are you speaking of?

Q. The Monday before the fire, that would be Monday, the 19th.

A. Yes, I do. As I remember, correctly, there had been a color t.v. set near the fireplace, as you face the fireplace on the right-hand side, in the corner.

Q. Now, where would the fireplace be, sir?

A. That would be on the top gallery, up there to the east wall.

Q. The east wall here?

A. Yes, sir, about in the center.

Q. About in the center?

A. Yes, sir.

Q. Now, to your knowledge, what happened to this television set?

(399) A. A gentleman had come in to repair the t.v. set. After he repaired it, we loaded it on Mr. Tyler's yellow Chevvy pick-up. To the best of my knowledge, it was delivered.

Q. Ok. Do you recall removing any cash registers from Tyler's Auction on that Monday?

A. Myself, I did not remove a cash register, but it was Mr. Tompkins that did take the cash register up to the store in Flint.

Q. Did they move a cash register in to take its place?

A. Yes, sir.

Q. Did you see the cash register that came in?

A. Yes, I did.

Q. Would you describe that cash register to us, please?

A. It was an old up-right type cash register, one of the big ones; they were trying to sell this cash register at the auction and it wouldn't move so —

Q. Now, did you see how many persons were carrying that cash register?

A. Just one person.

Q. One person carrying the cash register?

A. Yes, sir.

Q. Ok. Now, did you ever see any boxes of plaques in Tyler's Auction, while you were there?

A. Yes, I did.

Q. Did you ever see any on that Tuesday when you were unloading (400) the truck with Mr. Tompkins and Mr. Tyler?

A. Yes, I did. They were on — somewhere on the floor in the backroom and some were in the basement.

Q. Ok, and did you leave them in the back room and did you leave them in the basement?

A. Yes, I did. I had been told that they were moved up earlier, and moved around.

Mr. Bacalis: Just a minute, your Honor —

The Court: Objection sustained, the last phrase is stricken as to what he was told.

Q. Just tell us what you know, Mr. Frisch.

A. Yes, sir.

Q. Now, to your knowledge, did you see any of those plaques go out on the floor?

A. No, sir, I didn't see them go on the floor.

Q. All right, now, did you see any fold-away beds?

A. Yes, sir, I did.

Q. Now, what day, on Monday or Tuesday, did you see the fold-away beds?

A. On both days, sir.

Q. And where did you see them at the outset, where did you see them first?

(401) A. The first time I saw them was that Sunday, of the auction, and they were in the basement.

Q. And when was the next time that you saw them?

A. On that Monday, I helped move a few of them up into the top room. The rest were moved up later.

Q. Now, when you say hide-away beds, do these hide-away beds have mattresses on them?

A. No, sir, they didn't.

Q. Just plain regular hide-away beds, that folded up?

A. Yes, sir.

Q. Now, sir, are you familiar with — generally, Tyler's Auction, and what was in it, and this type of thing?

A. Yes, sir, I believe I am.

Q. Now, to your knowledge, before the fire, do you recall a closet in this particular area here, that would be the northwest room in the southwest corner?

A. Yes, sir.

Q. And to your knowledge, what was kept in that closet?

A. As I remember, there were files and some filing cabinets, old documents.

Q. To your knowledge, was any of that re-arranged?

A. Yes, it was. I helped in moving them out of that — some of them out of that room and boxes set on the (402) floor, around the walls.

Q. Uh-huh. And who assisted you?

A. Mr. Tompkins and Mr. Tyler.

Q. Uh-huh. And other than setting the records on the floor, the boxes on the floor, what else was done in that room, if anything?

A. In that room, the filing cabinets were cracked open slightly, left open, and the papers just set around inside the closet, the boxes were all open.

* * *

(454) Q. I now hand you People's exhibit number 46 and ask you whether you can identify the contents of that photo?

A. Yes, sir, I can.

Q. And specifically, that is a photo of what?

A. Well, this is a photo of the boxes that we had stacked along the wall that day when we were working in the store.

* * *

Q. Now, that picture shows certain records, where did you get those records?

A. They're the records that came out of the closet, directly above (455) the stairs.

Q. This area right here?

A. Yes, sir.

Q. Who took those records out of the closet?

A. Myself and Mr. Tompkins, and Mr. Tyler.

* * *

RICHARD HOFFMAN

Direct Examination

By Mr. Cooper:

Q. Now, were you assigned to or called in on a case concerning Tyler's Auction in Waterford Township?

(655) A. Yes, sir, I was.

Q. At that time, out of what Michigan State Police Post were you assigned?

A. Assigned to the Detroit Post.

Q. And to your knowledge, when were you called in on this investigation?

A. The morning of January 26, 1970.

Q. And do you recall what day of the week that was?

A. I think it may have been on Monday.

Q. And what was the first thing that you did, if you can recall?

A. I went and contacted Lieutenant Somerville, who called me, and Detective Webb, and discussed the fire, they wanted me to look at, for a short while, then we went out to the scene of the fire.

Q. This conversation took place at the Police Department, Waterford Township?

A. Police Department or Fire Department.

Q. From there, you went where, sir?

A. To 6959 Highland Road, at Tyler's Auction.

Q. That's in Waterford Township?

A. As far as I know, sir.

Q. After you got there, what happened next, if anything?

A. I made a cursory inspection of the inside of the building, and the general damage by the fire, the burning that took place. (656) I tried to determine whether or not — what — find the cause and origin of the fire.

Q. Now, sir, where did you — where did you go on that Monday morning, when you went into Tyler's Auction?

A. I believe the first place we looked at was the northwest section, because I had been told that there had been some containers found in this area here. I was first interested in this area here. From there, I looked down the stairs, checked the stairs, saw part of the stairway

was cut away, as Lieutenant Sommerville told me he had already done. There were some areas in here the carpet was cut out. I went from there over to this area here, checked the stage area, surveyed the damage to this area here. Surveyed the general debris in the area, tried to determine what the cause of the fire was.

Q. All right. Now, sir, did you take any pictures at Tyler's Auction?

A. Yes, sir, I did.

Q. And when did you take those pictures, sir?

A. I took some pictures that day, on the 26th. I took probably three or four rolls of pictures. In doing so, we sent our film to Lansing to be developed and they got lost in the mail, and I had to take some more afterwards.

Q. When did you take the second set, sir?

(657) A. On the 16th, February the 16th.

Q. February the 16th?

A. Yes, sir.

Q. Now, was there any difference in the building, when you took the pictures on the — what was the date you were there, at the outset?

A. The 26th.

Q. Was there any difference in the building on the 26th than when you took the pictures on February the 16th?

A. No, sir, there was not.

Q. Approximately how many pictures did you take on the 16th?

A. Probably four or five rolls.

Q. Now, the slides that you have here, are these the same pictures that are depicted in this group of photos that I have in my hand?

A. Yes, sir, they are.

Q. These are the ones that we have shown to counsel?

A. Yes, sir.

Mr. Cooper: Your Honor, at this particular point in time, we would move to introduce these slides into evidence.

The Court: You want those considered exhibit 51, is that right?

(658) Mr. Cooper: Yes, your Honor.

The Court: Any objection?

Mr. O'Brien: No objection, your Honor.

The Court: Any objection?

Mr. Bacalis: None, your Honor.

Mr. Bain: None.

The Court: Exhibit 51 is received in evidence. You may proceed to show the slides.

Q. Is it possible, Detective Hoffman, that you sit in your seat, or not?

A. I think probably I can. This is a picture of the back of the northwest room. It shows the open door going up the — from the basement, and the two — the double door at the north end of the building on the west side. I removed these pieces of plywood myself and opened the other door myself to take these pictures. Removed the plywood so I could have more light inside the building.

Q. Was there a piece of plywood on this door here, sir, when you arrived?

A. No, sir, that was nailed shut.

Q. This door here was nailed shut?

A. Because of the deadlock bolt, it was nailed shut, I opened it.

(659) Q. How about this door here?

A. It was shut. It was boarded up and I pushed it open.

• • •

(660) Q. All right.

A. I might point out just inside this door, on this same day, I found a small piece of fuse in the crack of the landing, about three-eighths of an inch long.

Mr. O' Brien: This is in February, Sergeant Hoffman?

A. Yes, sir.

Mr. O'Brien: February what?

A. 16th. This is the entrance to the front.

Q. And what is the significance of this photo, as far as your investigation is concerned?

A. When I took this picture, I had already had an interview with Mr. Tyler. When I interviewed him, we walked in this front door, and as he walked in the front door, he stated —

* * *

(662) A. This is the door we entered, this is just inside the front door of Tyler's Auction. And, as we walked in the door, Mr. Tyler exclaimed to me, he said, "My beautiful lamp that was hanging over this table sitting there," in, I guess you'd call the vestibule. He said, "It's gone."

* * *

(671) Q. What is the difference between the photo you have on the screen now, [#11] and People's exhibit number 46?

A. Well, in the photo I have on the screen, it shows where the boxes had been sitting and the smoke residue on the floor. Shows that they were there before the fire. Shows where they were spaced and sitting on the floor. I might add that I had these boxes removed by Sergeant Paul Brabant of the Warren Crime Lab, the Michigan State Police Warren Crime Lab, had these (672) boxes checked for fingerprints.

* * *

(673) A. Mr. Tyler advised me that these records were Mr. LaLonde's records, the previous owner's, and that Mr. LaLonde, at one time, had asked him if he could get those records, and Mr. Tyler stated he refused Mr. LaLonde those records, and they had been in the closet, where you see my camera box sitting by the door of the closet, and they had been filed there the day he left the scene and locked the doors.

* * *

(681) Q. Why were you interested in the circuit breaker, sir?

A. I was interested in the possible accidental cause by electricity.

* * *

A. This is number 21.

Q. It's a picture of what, sir?

A. This is a picture of the northeast display room, as you would call it, showing a picture of the fireplace. This is the remains of the furniture in this room. It shows the right-hand side of the fireplace.

Q. What was the significance of this photo in your investigation?

(682) A. It also shows the papers on the floor that could have possibly been used [as] trailers. You can see where the paper has been moved out, and it shows the floor clean right over the word number two there. It shows that there's not too much damage to the furniture itself in this area. Otherwise, the cushions are burned off, but the wood still remains. The chair and two couches, and other chairs over by the fireplace, there's still remains of wood. And I'd like to refer to this later, if I may. And there was sufficient amount of heat here, I'd say equivalent amount of heat here, as there was in the other part of the building.

* * *

(684) A. Mr. Tyler pointed to this area and he stated, "My new color t.v. is gone." Underneath this is a wall that separated another area from the furnace, underneath this is a pile of ashes where debris fell down through it. I checked through these ashes. I scraped through them. I found no chassis, remains of any screws, or any remains of any kind of appliance, t.v. set, or any kind of furniture at all in this area.

* * *

(686) Q. What is the significance of this photo?

A. I just wanted to show that there was no fusing of the wiring here, no sorting of the wiring, the insulation was just burned off, no tearing of the wire to show it could have been an accidental cause. This is general debris of the office area, the papers on the floor, the cash register and the safe. This is number 25.

* * *

(688) A. Yes, sir. I'd like to point out here something I'd like to bring up before — if I may get down —

Q. Yes, you may, I think there's a pointer there.

A. These areas right here, this darkened area right here along the wall, this is what we call a steel bar joice and in between these were two by fours that held the plasterboard ceiling up. Now, this was important in this fire because there's evidence of at least three explosions in this building. When this happened, you have an explosion down here, this would weaken the ceilings, causing plasterboard ceiling to come down and cover anything that's on the floor. Otherwise, preventing anything from burning. I've experienced this in other fires. The ceiling will be the first thing to come down. You have more heat up towards the ceiling than you do

the floor, causing the plasterboard ceiling to come down and cover things in this area down here. Now, when this happens, it tends to put out the fire in the lower area, it will protect and preserve evidence in this area. I found this many times. This is the way we sometimes determine the cause of the fire by clearing debris (689) that fell from the ceiling you can tell almost exactly where the fire originated at. Now these, to me, were one by two's along the wall here. Now, I didn't find no remains of any furniture in this area , over-stuffed furniture. There was alot of two by fours on the floor, from the ceiling, charred two by fours, a few springs, but no wood remains. Now, I checked furniture many times and I do a little re-upholstering myself, and the building up of a living room suite is usually hardwood. Remember, I referred to the other picture, that showed the northeast room, showed the two couches, showed the remains of the couches, just the cushions were burned off. I would say if there was a number of living room suites in this area, there should have been the remains, the same as in this room in the front. There's no evidence of this in this area at all.

Q. What about the pole, is the pole at all significant in your investigation?

A. I didn't hear you, sir?

Q. The poles?

A. This shows extreme heat, and the heat does rise and the heat is higher up in this area than down here. The poles start weakening in this area, start coming down. It shows the charring of one by twos along the wall here, are still intact. You have to ask yourself why wouldn't a piece of hardwood furniture (690) which would be a more substantial material, be still intact on this floor area here, when you have more heat up here than you do down here.

Q. What area are you talking about, on the floor itself?

A. I believe there was testimony in regards to a certain amount of living room suites on the floor, here, in the proof of loss. I believe the number is 24, there was no remains of the furniture in this area whatsoever.

Q. When you say this area, what area are you referring to?

A. I'm talking about the entire area, you could walk through here freely; there was considerable debris on the floor, but you didn't have to walk around furniture that would have been similar to the furniture that was in the front of the store. This is number 28, you can see that there's the remains of two by fours —

* * *

(693) Q. Where was this photo taken?

A. This was under the stairway, I believe, the round object you see there is some piping for the water supply, for the building. This is another piece of ash, this is number 37, the end of my pencil. Number 38 is a photograph of the furnace, showing there was no burning in this area whatsoever. This is a close-up of the furnace, shows no fire damage. I might add I (694) called in Consumer's Power, had them check the furnace out. They also took photographs, and their report to me is that as far as they were concerned, it was operating ok and had no new parts added to it. I might add I also had Sergeant Brabant come in and check this furnace for prints. He found no prints on the furnace. This is the left side of the furnace on the inside.

* * *

(705) Q. Now, sir, after the first date that you were at the fire, what was the first date that you were again at Tyler's Auction?

A. The 29th of January, 1970.

Q. All right. Now, who did you talk to on that date?

A. I talked to Mr. Tyler. I first talked to him at the Central Fire Station.

Q. How did you get ahold of Mr. Tyler on that date?

A. I believe that when I originally went there, Mr. Tyler was still out of State. As soon as he came back, Lieutenant Sommerville got ahold of him, had an appointment made to meet him at the fire station.

Q. So the first date you were in the building then was on the 29th, is that correct?

A. Yes, sir — no, sir, I was in the building on the 26th, and I went (706) with Mr. Tyler on the 29th.

Q. And who was present when you first saw Mr. Tyler?

A. Lieutenant Sommerville. There were some other members in the fire station, but we went into Mr. Sommerville's office.

Q. All right. And at that time, what happened?

A. I introduced myself to Mr. Tyler, and told him who I was. And I advised him of his rights.

* * *

(708) Q. What did Mr. Tyler say at that time?

A. We discussed the — where he was at during the fire.

Q. What did he tell you?

Mr. O'Brien: Objection.

A. He said he was out of —

The Court: Again, this is not admissible against anybody except Mr. Tyler. You may proceed.

A. He stated he was last at the building on Wednesday, January the 21st, he had secured the doors, locked them, and went and talked to Mr. Wells, told Mr. Wells to take in any deliveries he had and put them in his basement at the Quick Food Market. He talked about insurance, how much insurance he had on this building.

He stated that he had moved two loads of furniture into the building with the aid of Mr. Frisch. He agreed to go with us, a little later that morning, to go to the Tyler's Auction, to survey the scene. He stated to me that the — he thought it must be an arson. And he asked me what the going price on an arson was. And in the same breath, he says, "Is it $10,000 or $15,000?" I stated, no, it was a thousand dollars, to the best of my knowledge. And, after that, we went and maybe met with him a half hour later, at Tyler's Auction.

Q. Who was present at that conversation?

A. Best I can recall, Lieutenant Sommerville, myself, and Mr. Tyler (709) may have had somebody with him at the time, but it wasn't — I may have met the man, but I don't recall who it was.

Q. This, again, was on the 29th?

A. Yes, sir, it was.

Q. And what did Mr. Tyler say once he got to the auction, if anything?

A. Well, as we opened the door, which was padlocked by Lieutenant Sommerville, we entered the building. And when we got into the vestibule there, he first exclaimed, that his beautiful hanging lamp was gone. Then we went into the other areas. He stated that his t.v. was gone, and —

Q. Where was his t.v.?

A. The one that was sitting right to the right of the fireplace, his color t.v. set was gone. Going back to the interview at the fire station, he indicated — I asked him a question how many t.v's he had in the place. He said 11. We got to the Auction, he said he believed there were nine, at this time. We went into the northwest room. We observed the records sitting on the floor. And he kicked the records. And, at this time, he told me that Mr. LaLonde had requested these records at one time, and he

had refused him. And I asked him not to touch the records, because I wanted to preserve those for evidence. I believe that's about the extent of it, at that time.

* * *

(711) A.*** And I asked him [Tyler] again about the locking of the door, the securing of the door, before he left the Auction to go out of State. And he said he double checked the doors, used double two by fours to secure these doors.

Q. You say he used double two by fours, what areas was he talking about?

A. The areas he indicated, the two double doors on the west side of the building.

Q. Did he talk about the security of the front door?

A. We talked about the key, to his door. He stated he would never give his key to anybody.

* * *

(741) Q. I now hand you what purports to be People's proposed exhibit number 54, and ask you whether you can identify same?

A. Yes, I can, sir.

Q. And how can you identify it?

A. By my name and the date.

Q. When and where did the proposed exhibit come into your possession?

A. Came into my possession the morning of February 16, 1970. I took this out of the landing in the crack in the stairway landing, at the rear basement door of Tyler's Auction.

Q. And, for the purpose of the record, what is People's proposed exhibit 54?

A. To me, it's a short piece of green fuse, about three-eights of an inch long.

Mr. Cooper: At this time, your Honor, the People move to introduce into evidence, People's proposed exhibit number 54.

* * *

(743) Mr. Bacalis: Sergeant, when you seized this piece of evidence, you did not have the consent of the occupant, Mr. Tyler, to enter the premises, did you?

A. Not Mr. Tyler's

Mr. Bacalis: And, at that time, you did not have a search warrant, is that correct?

A. No, sir, I did not.

Mr. Bacalis: You entered the premises for the sole and exclusive purpose of making an investigation and seizing evidence, if you could find any, isn't that correct?

A. Yes, sir.

Mr. Bacalis: Isn't it also true that there was a period of time following the extinguishment of the fire, where there was no police or fire guard at the premises and the premises were left open?

(744) A. Yes, sir — I don't know about being left open. Every time I went to the premises, they were locked and secured.

Mr. Bacalis: Did you ever go to the premises and find the rear doors, the double doors, wide open?

A. Some time after that date, yes.

Mr. Bacalis: After what date?

A. After February 16th.

Mr. Bacalis: Well, I would object to the evidence, your Honor, on the grounds it's illegally seized, and violates the search and seizure rights.

The Court: Objection overruled, exhibit 54 is received in evidence.

* * *

(745) Q. I now hand you what purports to be People's proposed exhibits 55, 56, 57, 58, 59, and 60, and ask you whether you can identify same? I also hand you People's exhibit number 61, and ask you whether you can identify that?

A. Yes, I can.

Q. How can you identify each of these exhibits?

A. My initials and the date, and complaint number on each exhibit.

Q. When and where did these proposed exhibits come into your possession?

A. On the 16th day of February, 1970, at Tyler's Auction.

Q. Where did they come into your possession?

A. From Tyler's Auction.

* * *

(746) Mr. Cooper: At this time, the People move to introduce into evidence People's proposed exhibits 55 through 61.

The Court: Any objection?

Mr. Bacalis: Same objection, your Honor.

Mr. O'Brien: Same objection, your Honor.

Mr. Bain: Same objection.

Mr. O'Brien: I have one or two questions, if the Court please. Detective Hoffman, this is at the occasion of your taking the second set of pictures, is that right?

A. Yes, sir, it is.

Q. Mr. O'Brien: What was the date you were in there prior to that?

A. I was in there on the 26th.

Mr. O'Brien: Of January?

A. January.

Mr. O'Brien: This was February 16th?

(747) A. Yes, sir.

The Court: Objection overruled, exhibits 55, 56, 57, 58, 59, 60, and 61 are received in evidence.

Q. Now, calling your attention to exhibit number 61, why did you take possession of that exhibit?

A. Well, this was in an area that — in an area where there was fire and extensive damage, and it had a film of smoke residue over it, and I wanted to submit this to the laboratory to see if they could scrape off the smoke residue and analyze the smoke residue and see what they could come up with.

Q. Now, other glass that you found in the building, did you have occasion to look at that?

A. Yes, sir, originally, when I made my initial investigation, the glass that I found outside the building was relatively free of smoke residue. What I'm saying is that when you have an accidental fire, where the fire originates and burns up slow, there will be a film develop over the inside of the windows. But the windows that were broken out, there was no smoke residue on the inside of the windows. It was as clean as the outside. They were blown out, there was no time for a build-up of smoke residue. The windows were blown out completely. But the glass that did remain in the fire, as it progressed, they were smoke covered. And these are the samples I took.

* * *

Cross-Examination

By Mr. Bain:

(754) Q. Now, did you have occasion to check the front door of that building?

A. Yes, sir.

Q. All right. And how did you find that it locked?

A. When I saw the door, it had been chopped open by the firemen and there was a chain lying there with a padlock. The padlock was still locked, but the chain had been cut.

* * *

Cross-Examination

By Mr. Bacalis:

(859) Q. Sargeant, what I'm interested in having you show the jury is the furniture, the photograph shows that you saw on the premises.

A. There appears to be a spring here, I don't know if it's a bed spring from a mattress or — it appears to be, in this photograph, remains of some kitchenware, some steel chairs. This may have been a studio couch of some kind, with a metal frame.

Q. Is this part of the junk furniture?

A. Could be.

* * *

Q. You ought to be able to tell from the frame something about age or vintage?

A. From this, I can't tell, it's a frame of a type of lounge, or could have been a porch swing. This shows, like I stated before the metal remains, and non-combustible portions of kitchen chairs, on the stage area, I believe. Of course, this is the front room where I said there was a couch and some overstuffed chairs (860) remaining. This is again the stage area, showing only the remains of a few metal chairs. A lot of this debris is fallen down from the roof above the insulation. This

shows the bed springs of the beds that were mentioned, roll-away beds. I think this portion right here of this, it's the same portion over here. Another picture right here. Right here, the other end of this picture here. The same bed or same lounge, whatever it was. There is a remains, looks like an overstuffed chair right here, the wood portion. These are two by fours here. Two by fours here. These darkened areas appear to be two by fours. This area here shows the non-combustible metal parts of the kitchen chairs. This is two by fours here, two by fours, two by fours. This looks like shelving and portions of the ceiling that came down here. This is a closer view of this picture right along here, showing this chair right here, bottom side of it. Looks like a chair that has a frame remaining, looks like a possible similar type of a chair in this area here. And shows a close up of the bed again, here. These are two by fours here. And I see nothing in this area here at all.

* * *

MOTION BY MR. BACALIS

(917) Mr. Bacalis: I have a matter which I don't think Mr. Bain is much concerned about, your Honor. I wanted to make a motion to strike Detective Hoffman's testimony on the theory of illegal search and seizure. The evidence he learned was by illegal entry, as far as occupancy is concerned. I wish to strike his testimony, because it was got in an illegal manner.

The Court: Motion to strike is denied. Has anybody seen Mr. Bain?

* * *

MAYNARD LA LONDE

Cross-Examination

By Mr. Bacalis:

(921) Q. All right. Now, you say you didn't know Oscar Frisch very long, is that correct?

A. Not very long, no. Something around a year, I believe, or less.

Q. You remember what time of day it was when he called you on January 31st?

A. I believe it was in the early afternoon.

Q. And when he called, did he tell you that he knew something about who set this fire and he wanted to tell you about it?

A. That's correct.

Q. At that point, why didn't you tell Mr. Frisch to go straight to the police?

A. I did.

Q. And so you arranged to have a meeting in your home, that's your idea of going straight to the police?

(922) A. I'll explain that. I suggested to Mr. Frisch that he should take this information to the police. Mr. Frisch was quite upset when he was telling me about this. He said he feared for his safety and his family's. And he said that he didn't want it to become known that he was giving this information. So that is why I called Detective Webb and told him of the conversation with Mr. Frisch. And we met at my home that evening, with Lieutenant Webb and another detective.

* * *

(926) Q. Mr. Tyler paid his rent through January 31st, isn't that correct?

A. He paid January's rent in February, the first part of February.

Q. My question was —

A. He was a month behind.

Q. My question was he paid the rent through January 31st, 1970, did he not, even though he paid it late?

A. Yes, he paid it around the 3rd or 4th of February, that's correct.

Q. So when you say he didn't pay his rent, you're talking about February, 1970, right?

A. That would be right, yes.

(927) Q. You're talking about a rent a month in advance, for a month in advance, on February ?

A. That's right.

Q. And during this period of time, that Mr. Tyler didn't pay his rent in February, you took no steps whatsoever, to terminate his lease and put him out, right?

A. No, I went over and tried to collect it, numerous times.

Q. Well, other than making demand for the rent, you didn't take any steps to terminate his lease or occupancy, put him out?

A. I did not.

* * *

LYLE SWEET

Direct Examination

By Mr. Cooper:

(932) Q. Now, in the early part of February, 1970, did you have an occasion to go into Tyler's Auction on Highland Road?

A. Yes, I did.

Q. And who was with you, if you can recall?

A. Detective Webb, from the Waterford Police Department, and Office Hoffman, from the State Arson Squad.

Q. Can you recall what time of day, morning or afternoon, or what part of the day were you there?

(933) A. I'm not sure, but I believe it was around 10:00 o'clock in the morning.

Q. Why were you there, sir?

A. To see what parts of televisions may exist.

Q. Were you there at anyone's request?

A. Yes, Detective Webb and Officer Hoffman.

Q. Now, once you got there, sir, what is the first thing you did, if anything?

A. Well, we entered the building, and sorted the debris.

Q. And where did you go, once you got inside the building?

A. Well, pretty much all over it. I had been in there prior. I knew about where the televisions were in the building.

Q. You went to a particular area in the building?

A. Yes.

Q. And when you arrived in that particular area, what did you do?

A. Well, we sorted the debris over to find any parts of televisions that may exist.

* * *

(934) Q. Did you take possession of any parts or anything like that?

A. Yes, the chassis, I took possession of.

* * *

(935) Q. Now, approximately how long did you spend in the building on that date, sir?

A. Oh, I would say probably a couple hours anyhow.

Q. And, other than the t.v. chassis, themselves, did you find any other tubes or anything else?

A. No, this would probably pretty well burn up. The chassis is the only thing which would survive, anyway.

* * *

Cross Examination on Exhibit

By Mr. Bacalis:

(939) Q. Mr. Sweet, were you there with the permission of Mr. Tyler when you were examining these tubes and chassis?

A. I was at the request of Detective Webb and Detective Hoffman.

Q. And was there any search warrant shown to you?

(940) A. I don't remember.

Q. Well, you were there solely and exclusively for the purpose of the police?

A. Yes.

Mr. Bacalis: I would object, also, your Honor.

The Court: Objection overruled, exhibits 64, 65, 66, and 67 are received in evidence.

* * *

JOHN ROEPER

Direct Examination

By Mr. Cooper:

(941) Q. Now, did you have an occasion to look at the furnace at Tyler's Auction, on Highland Road?

A. Yes, I did.

Q. And when did you look at that, sir?

A. I can't tell you as to the date, it was right after the fire.

Q. Uh-huh, and by whose invitation were you there, and for what reason? Who were you called by?

A. By the State Police.

(942) Q. And who was with you when you looked at the furnace?

A. There was two other gentlemen from Consumer's Power, J.C. Lane and Jim Wilcox.

Q. And was there anyone from the State Police?

A. Yes, Mr. Webb, and the — another gentleman, I believe it was the insurance investigator or — I don't know just exactly.

Q. Now, did you, in fact, look at the furnace, sir?

A. Yes, I did.

Q. What did you do, once you were down to the furnace room, looking at the furnace?

A. Well, we checked the furnace over and we also took some pictures of the furnace.

* * *

LOREN TYLER

Direct Examination

By Mr. Bacalis:

(1213) Q. Now, how did you lock up your building at night?

A. Well, there was only one way in the store from the outside, with keys, and that was the front entrance. The side doors and the unloading doors is what we call the side doors, were double doors, and they were secured with double two by fours on the inside. The only other door that wasn't secured with a two by four was a door in what we call the Colonial Room, at the foot of the stairs, the steps, which I kept nailed shut, and I also kept a two by four brace from the door to the inside wall of the stairwell.

Q. Now, with reference to the locks, how many locks were on those front doors?

A. There was one key and tumbler in each door, and I always kept a locked chain and padlock, besides, on the handles.

* * *

(1215) Q. Mr. Tyler, I show you People's exhibit Number 44, and ask you if that's the chain and lock you had on the door?

A. It looks like it.

Q. Is that the type of chain and lock that you had on the door?

(1216) A. Yes, sir, it is.

Q. And did you pass that through the door handles, is that how you locked or secured the building?

A. Yes, sir.

Q. So altogether then there were three locks, is that right?

A. Yes, sir.

Q. The two tumblers on each of the double doors?

A. One lock on each door, that took a key, and the key for the padlock.

* * *

(1229) Q. Now when you came back on the 29th, did you inspect your building at Tyler's Auction?

A. No, I didn't.

Q. When is the first time you looked at it?

A. Sometime during the day of the 29th, with Detective Hoffman and a gentleman from the fire department.

Q. And you went over to the building with them?

A. Yes, sir.

Q. Did they ask your permission to go in?

A. No, sir.

Q. Why did you go in?

A. Because they had requested me to.

Q. Now, when you were in the building, did you observe whether or not there were any evidences of the building being locked up, secured, or whether it was partially opened, or how would you describe it?

A. The morning that I went into the Auction, the first time after the fire,, was either the 29th or 30th, with Detective Hoffman, and (1230) Lt. Sommerville from the Fire Department. They opened the front door with a key. And we went in and as we went through it, started down, the steps, the door on the right-hand side of the steps, the — was completely open. There was nothing on it, the plywood had been taken off. We could have walked around the building and come in without a key.

* * *

Q. Did you examine the premises with both of those officers on that occasion, yourself?

A. Not very well, but we — I would say that we were in the store a matter of 15 minutes, if we were in there that long.

* * *

(1234) Q. Now, when you made this inspection of your store, after you returned on January 29, 1970, did anybody ask you for consent to enter the premises?

A. No, sir.

Q. Did you give consent?

A. No, sir.

Q. Then why did you go into the premises with the police officer?

A. Like I stated Tuesday, I went in at their command, they asked me to go up there with them.

Q. Now, during this period of January 22nd to April the 22nd, how would you describe the security precautions as to your building, Tyler's Auction Incorporated?

A. Very poor.

(1235) Q. Why do you use that description?

A. I can't even begin to tell you the times that I've went there and for one time for over one week's stretch at a time, there was some windows that had never been boarded in the whole week's period. And, in fact, on two occasions, we went there and there was kids in the neighborhood playing house or games in and out of the back doors.

* * *

Cross Examination

By Mr. Cooper:

(1281) Q. So, at any rate, at the time of the fire, this one would be the accurate one then, People's exhibit number 36?

A. Yes.

Q. Now, is this the file cabinet in which your records were in, for Tyler's Auction?

A. Some of them.

Q. That were destroyed?

A. Some of them.

Q. Now, were you able to salvage any records from Tyler's Auction out of this filing cabinet?

A. Are you kidding? I never got a thing out of that store.

Q. All right, my question to you is whether or not you got any records out of this file?

A. No, sir, I did not.

* * *

76 [redacted]-1608

FILED
JUL 23 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. . . . .

STATE OF MICHIGAN,
Petitioner,

v.

LOREN TYLER and ROBERT TOMPKINS,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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JURISDICTION

Petitioner bases jurisdiction upon 28 U.S.C. §1257 (3).

The Michigan Constitution prohibits unreasonable search and seizure. Mich. Const. Art. 1, §11. When the Michigan Supreme Court reversed the decision of the Michigan Court of Appeals, the court noted that the Court of Appeals had rejected Respondents' claims on

both the Fourth Amendment and the corresponding provision of Michigan's Constitution. *People* v. *Tyler*, 399 Mich. 564, 569 (1977). The Michigan Supreme Court has occasionally interpreted provisions in Michigan's constitution that parallel provisions in the federal constitution differently that the United States Supreme Court has interpreted the parallel federal guarantees. *People* v. *Turner*, 390 Mich. 7, 210 N.W. 2d 336 (1973). See also *People* v. *Tyler*, 399 Mich. 564, 570 fn. 7. Consequently, whether the United States Supreme Court has jurisdiction is unclear. The citation by Petitioner of *People* v. *Moore*, 291 Mich. 426, 216 N.W. 2d 770 (1970), is not relevant to the instant case. No narcotic drugs, firearms, bombs, explosives or other dangerous weapons were involved in the seizures in the instant case; thus the Michigan Supreme Court is free to impose a higher standard of reasonableness for these searches and seizures than the standard of reasonableness the United States Supreme Court has held that the Fourth Amendment requires.

As to the question of Respondent Tompkin's standing, this court does not have jurisdiction to review that question.

> "It is, of course, a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only to cases involving state substantive grounds, *Murdock* v. *City of Memphis* 20 Wall 590, but also in cases involving prodecural state grounds. Compare *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126, with *Davis* v. *Wechsler*, 263 U.S. 22. But it is important to distinguish between state substantive grounds and state procedural grounds. Where the

ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law. Thus, the non-federal doctrine is necessary to avoid advisory opinions.

These justifications have no applications where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965).

Footnote seven in the *Tyler* opinion clearly indicates that exactly on point decisions of the United States Supreme Court do not foreclose the standing issue in Michigan state courts. 399 Mich. at 571. That is, the Michigan Supreme Court considers the issue of standing to be an issue of state law. Thus understood, the Michigan Supreme Court's refusal to consider the standing question was a decision to enforce state procedural rules to ban consideration of a state law question. Consequently, the United States Supreme Court has no jurisdiction to consider Question III of Petitioner's Questions Presented.

QUESTIONS PRESENTED

1. After fire officials have extinguished a fire and left the scene, may the fire officials or police officers thereafter conduct a warrantless search of the damaged premises?

STATEMENT OF THE CASE

This case arises out of a fire that occurred a few minutes before midnight on January 21, 1970. 399 Mich. at 570.

The fire department arrived at the scene shortly after midnight. While fighting the fire, the firemen discovered and seized certain evidence that was admitted at the trial; Responents do not challenge the admission of this evidence. 399 Mich. at 570.

At 4:00 a.m. on January 22, 1970, the firemen left the scene and the building was left unattended. 399 Mich. at 570.

At 8:00 a.m. on January 22, 1970 the fire chief and an asistant returned to collect evidence as part of a criminal investigation. 399 Mich. at 577. They entered the premises, conducted a search, and seized certain evidence that was admitted at Respondents' trial; by a timely motion and objections in the trial court, Respondents challenged the admission of this evidence. 399 Mich. at 570.

On February 16, 1970 a police sergeant entered the premises and seized certain evidence that was admitted at

Respondents' trial; by a timely motion and objections in the trial court, Respondents challenged the admission of this evidence. 399 Mich at 570.

The constitutionality of the challenged searches and seizures was the central question in the appeals to the Michigan Court of Appeals and the Michigan Supreme Court.

ARGUMENT

The holding of *People* v. *Tyler*, 399 Mich. 564 (1977), involves no substantial federal question.

Based on the facts stated above, the Michigan Supreme Court said:

> "While it may be no easy task under some circumstances to distinguish as a factual matter between an administrative inspection and a criminal investigation, in the instant case the court is not faced with that task. Having lawfully discovered the plastic container of flammable liquid and other evidence of arson before the fire was extinguished, Fire Chief See focused his attention on an assembling proof of arson and began a criminal investigation. At that point, there was probable cause for an issuance of a criminal investigative search warrant." 399 Mich. at 577.

Consequently, the Michigan Supreme Court was holding that an unconsented, warrantless search during a criminal investigation that is not justified by exigent circumstances, is illegal, and evidence for the search must be suppressed.

Petitioner argues that an exception to the warrant requirement should be established of fire damaged premises because respondents had little reasonable expectation of privacy in the premises. The Michigan Supreme Court explicitly rejected this contention of the facts of the present case.

> "We agree that a warrantless entry would not invade a constitutionally protected interest in privacy, if the owner or occupant of the burned premises abandoned the property or the premises are so completely destroyed that there no longer are recognizable objects of personal property. The record does not factually support a conclusion that Tyler had abandoned the fire damaged premises." 299 Mich. at 582-583.

As support for its conclusion, the Michigan Supreme Court noted that:

> "a warrant [is] required even if the investigation of a fire is to determine 'the cause of the fire under investigation' and does not 'place a person under criminal investigation.' "

This conclusion is obiter dictum but is unassailable.

Camara v. *Municipal Court*, 387 U.S. 523 (1967), held that a warrant is required to justify a routine annual inspection for housing code violations. The *Camara* court advanced three reasons for this conclusion. First, a strong policy exists that invasions of private property should be only after a warrant has been issued.

> "Nevertheless, one government principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private propery without proper consent is unreasonable unless it has been authorized by a valid search warrant." 287 U.S at 528-529.

Second, even though a search for a code violation is less hostile and intrusive than a search for evidence of a crime, the search nevertheless violates areas where persons have a justifiable expectation of privacy.

> "For instance, even the most law abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. 387 U.S. at 530-531.

Third, the government objectives could be achieved within the requirement that a search warrant be obtained. 387 U.S. at 533.

The reasons advanced in *Camara* in support of the decision all exist in the present case. The strong policy against warrantless searches remains. The type of seizure conducted does invade areas where persons have an expectation of privacy unless the person abandoned the property or the property is completely destroyed, neither of which exists in the instant case. 399 Mich at 582-583. Lastly, the government objective can be achieved although a search warrant is required for the administrative search. 399 Mich. at 578. Consequently, under *Camara* search warrants were needed even if the searches by the fire chief and police sergeant were administrative searches instead of criminal investigations.

CONCLUSION

While the Michigan Supreme Court relied on *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and *See* v. *Seattle*, 387 U.S. 541 (1967), to reach its holding, the result in *Tyler* is unaffected by those cases. As the Michigan Supreme Court noted, the record shows that government officials, to further a criminal investigation, made a search of property that Respondents had an interest of privacy in; the record shows no consent, no exigent circumstances. The Michigan Supreme Court then applied the rudimentary principle that absent consent or exigent circumstances, evidence from warrantless searches must be suppressed. Unless the United States Supreme Court is prepared to alter the fundamental premises of Fourth Amendment jurisprudence, this holding involves no substantial federal question.

Consequently the Petition for a Writ of Certiorari should be denied.

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Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

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PETITIONER'S BRIEF

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 399 Mich 564; 250 NW2d 467, and is printed at page 17 of the petition for certiorari. The opinion of the Michigan

Court of Appeals is reported at 50 Mich App 414; 213 NW2d 221, and is printed at page 36 of the petition.

JURISDICTION

The decision of the Michigan Supreme Court was filed on February 14, 1977. The petition for a writ of certiorari was timely filed on May 16, 1977, and was granted on October 3, 1977. The jurisdiction of this Court is invoked under 28 USC §1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable [redacted] shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

QUESTIONS PRESENTED

I.

WHETHER A WARRANTLESS SEARCH OF FIRE-DAMAGED PREMISES TO DETERMINE THE CAUSE OR ORIGIN OF THE FIRE, CONDUCTED OR CONTINUED AFTER THE FIRE HAS BEEN EXTINGUISHED AND AT THE FIRST OPPORTUNITY TO MAKE A DAYLIGHT VISUAL INSPECTION, IS CONSTITUTIONALLY PERMISSIBLE?

II.

WHETHER A WARRANTLESS SEARCH OF FIRE-DAMAGED PREMISES TO GATHER EVIDENCE OF THE CAUSE OR ORIGIN OF THE FIRE, CONDUCTED UNDER CIRCUMSTANCES WHICH INDICATED THAT THE OCCUPANT HAD NO EXPECTATION OF PRIVACY IN THOSE PREMISES, WAS CONSTITUTIONALLY PERMISSIBLE, NOTWITHSTANDING THAT NO EXIGENT CIRCUMSTANCES EXISTED, THAT OFFICERS HAD WITHIN THEIR KNOWLEDGE FACTS UNQUESTIONABLY SHOWING PROBABLE CAUSE, AND THAT OFFICERS HAD AMPLE TIME TO GET A SEARCH WARRANT?

III.

WHETHER THE PROSECUTION SHOULD BE ENTITLED TO A DECISION ON THE MERITS OF A QUESTION OF STANDING AT ANY STAGE OF THE CRIMINAL PROCEEDINGS?

STATEMENT OF FACTS

Loren Tyler and Robert Tompkins were convicted of conspiracy to burn real property. Tyler was also convicted of burning real property and burning insured property with intent to defraud.

The fire occurred at Tyler's Auction in Waterford Township, Michigan, a building leased by Tyler where he conducted a retail furniture business (R.210-213). Tompkins was a business associate of Tyler's (R.1144-1155, 1237).

Physical evidence, taken by fire and police officials without a search warrant from the premises after the fire had been extinguished, was admitted at the trial over objection. (A.20-23, 57-60)

The fire began with two loud explosions shortly before midnight on January 21, 1970 (R.69-70). The fire department arrived shortly thereafter. Fire Chief See discovered and seized two plastic containers, one partially filled with a flammable liquid, before the firefighters left (A.8-10). Respondents did not challenge the admissibility of that evidence in the Court below.

Chief See conferred with Detective Webb of the police department at the scene shortly before the firefighters left. Webb's efforts to take pictures of the interior of the building were unsuccessful due to a malfunctioning camera and the fact that the building was filled with smoke and steam. (A.24-27).

By 4:00 a.m. on January 22 the fire was extinguished. The premises were thereafter left unattended until 8:00 a.m. when See returned with Assistant Fire Chief Somerville and together they briefly surveyed the area (A.16-18, 23-24).

Most of the interior of the building and all the furnishings and fixtures had been almost completely consumed by fire. Almost all that remained were metal parts of furniture. The acoustical ceiling had fallen onto the floor, and the steel support beams above were twisted and had all been very badly damaged by heat and fire (A.18-19). However, the northwest and northeast sections of the building were not as badly damaged. Though all the furniture fabric had been destroyed, a few pieces of

wooden framework were merely scorched and damaged by smoke, and there were some business records on the floor which had not been completely destroyed (A.51, 56-57).

Assistant Chief Somerville, who did not know the identity of the landlord and had been informed that the tenant was in Florida (A.22), returned with Detective Webb between 9:00 and 9:30 a.m. and discovered pieces of tape along a thin linear burn mark in the carpet of one room (A.19, 27-28). The burn circled the room, went through a door, and continued down a stairway to an exit. Pieces of carpet and wood containing the burn marks were removed, and the trial admitted over objection (A.19-23).

Four days later, on January 26, Sergeant Hoffman of the Michigan State Police, Arson Section, took photographs of the interior of the building which were lost in the mail (A.47-48).

On January 29, Hoffman and Somerville met with Respondent Tyler at the fire station. Tyler was advised of his Miranda rights, and agreed to talk with the officials (A.54-55). After having been informed of the condition of the burned building, Tyler gave the opinion that arson must have occurred (A.55-56). Following a brief discussion of insurance and the contents of the building, Tyler agreed to go with the officials to survey the scene of the fire, where he pointed out various missing articles (A.55-57). No photos were taken or evidence seized at that time.

Sergeant Hoffman returned without Tyler three weeks later, on February 16, and took more photographs, which were admitted at trial without objection (A.48-49). He

also found a piece of fuse and pieces of glass and other debris, which were admitted over objection (A.50, 57-60).[1]

Oscar Frisch, a part-time employee of Respondent Tompkins (A.32-33), was the principal witness tending to establish Respondents' guilt. He first inculpated Respondents in a conversation with Detective Webb on January 31, 1970 (R.265), and repeated "basically" the same story thereafter (R.322). He testified at trial (A.32-46) that for two days prior to the fire, he and Respondents moved nearly everything of value out of the store and delivered the merchandise either to buyers or to warehouses (A.33-37). During this period they filled the store with truckloads of worthless furniture (A.33-39) as well as cardboard they had been collecting since December to facilitate the burning (A.39-42; R.457-458).

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[1] The fact that Respondents in the court below challenged only the admissibility of Exhibits 5-11, obtained on January 22, 1970, and Exhibits 54-61, obtained on February 16, 1970 (Appellant's Brief Below, p. 3), tends to obscure the actual scope of the investigation in this case. In addition to the entrances onto the premises mentioned above, a furnace repairman inspected the furnace with Detective Webb on an unspecified date "right after the fire" (A.66-67). A television repairman examined the remains of television sets in early February in the company of Webb and Hoffman (A. 64-66). Although the photographs taken by Hoffman on January 26 were lost in the mail, it is apparent that his opinion that the fire was the result of arson was based at least in part upon observations he made on that date (R. 748-749). Most items of evidence that were removed, as well as the furnace and pieces of cardboard, were checked for fingerprints (A.50; R. 249-250). And both Webb and Hoffman examined certain records that were not destroyed sufficiently to determine that they belonged to the landlord, not to Tyler (A. 30; R. 798). Regardless of whether the constitutionality of these additional searches has been preserved for appeal, they are relevant to the general obtrusiveness of the investigation.

All items of disputed evidence tended to show that the fire had been deliberately set, but none tended to identify the perpetrator.

SUMMARY OF ARGUMENT

Fire officials have a duty to investigate the cause or origin of fires. Once a fire has been extinguished, the officials are faced with two possibilities as they begin their investigation. Either the occupant burned his own premises, or the fire was caused accidentally or by malicious arson.

If the former, the occupant's actions show that he has no expectation of privacy in his burned premises. By deliberately instigating so massive a disruption and invasion he has abandoned those premises within the meaning of the Fourth Amendment. The concepts of arson for profit and of Fourth Amendment protection of the burned premises are wholly incompatible.

If the fire was accidental or the result of malicious arson, the occupants of the premises are treated as victims by police and fire officials. The likelihood that they will be aggrieved by a possible intrusion into what little remains of their privacy in badly-burned premises is negligible. That privacy will not be protected by an administrative search warrant, which should issue whenever a fire has occurred. In addition, a fire is so readily ascertainable a fact that the judgment of a disinterested magistrate should not be necessary to determine its occurrence.

Once abandonment has been shown, a reentry into burned premises violates no constitutionally protected interest. This Court has never required the judgment of a

disinterested magistrate to determine whether a proposed investigation intrudes upon a protected area, only to determine when the right of privacy must yield to the right to search.

Finally, if Petitioner's arguments on the search and seizure questions are not accepted, we contend that in order to avoid the serious injustice of a retrial of Respondent Tompkins identical to his original trial in all constitutional respects, a hearing pursuant to *Simmons v. United States*, 390 US 377 (1968), should be ordered. If Tompkins cannot show standing, the judgment of conviction should be reinstated.

ARGUMENT

I.

A WARRANTLESS SEARCH OF FIRE-DAMAGED PREMISES TO DETERMINE THE CAUSE OR ORIGIN OF THE FIRE, CONDUCTED OR CONTINUED AFTER THE FIRE HAS BEEN EXTINGUISHED AND AT THE FIRST OPPORTUNITY TO MAKE A DAYLIGHT VISUAL INSPECTION, IS CONSTITUTIONALLY PERMISSIBLE.

The Michigan Supreme Court, in an opinion reversing Respondents' convictions, extended the Fourth Amendment warrant requirement by holding that fire and police officials need an administrative search warrant under *Camara v. Municipal Court*, 387 US 523 (1967), and *See v. Seattle*, 387 US 541 (1967), before searching fire-damaged premises for the cause of the fire once it

has been extinguished. The opinion was based upon this Court's distinction among regulatory, administrative, and criminal investigative searches, the rationale for which is the relative intrusiveness of each type of search. Petitioner contends that the Michigan Supreme Court's analysis is inappropriate to post-disaster investigations, which rarely deal with occupied homes and operational businesses, and which usually are conducted prior to a determination of whether a crime has occurred. But far more significant than the appropriateness of that analysis to post-fire searches in general is the fact that the court below ignored the single most important fact in any arson-for-profit case, that of the arsonist's expectation of privacy in his own burned premises.

A. AN ARSONIST WHO BURNS HIS OWN PROPERTY THEREBY ABANDONS THOSE PREMISES WITHIN THE MEANING OF THE FOURTH AMENDMENT.

One who deliberately burns premises that he owns or leases ordinarily does so to collect on a fire insurance policy, and thereby maintains a property interest in the premises which forms the basis of his claim. Petitioner concedes that this property interest is sufficient to give an alleged arsonist standing to contest any search of those premises. *Brown v. United States*, 411 US 223, 229 (1973). However, we contend that such an arsonist has by his actions shown that he has no expectation of privacy, or any other interest protected by the Fourth Amendment, in those premises. We believe that, by showing an expectation of publicity rather than of

privacy, an arsonist has come full circle to a position equivalent in all important respects to that of one who lacks standing,[2] in that searches of his premises involve no intrusion into a constitutionally protected area.

There is nothing unlawful about the search or seizure of abandoned property. *Hester v. United States*, 265 US 57 (1924); *Abel v. United States*, 362 US 217, 241 (1960). Though persons sometimes give up all property rights in goods that are determined to be abandoned for Fourth Amendment purposes,[3] "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Warden v. Hayden*, 387 US 294, 304 (1967).[4] "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 US 347, 351 (1967); *United States v. Santana*, 427 US 38, 42 (1976). Accordingly, "the proper test for abandonment [should be] not whether

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[2] The United States Court of Appeals for the District of Columbia Circuit could "see no reason for treating a person who abandons property before the search any differently from a third party." *Parman v. United States*, 130 US App DC 188; 399 F2d 559, 565, *cert den*, 393 US 858 (1968).

[3] E.g., *United States v. Martin*, 386 F2d 213 (CA3, 1967) (narcotics discarded during chase); *Vincent v. United States*, 337 F2d 891, 896-897 (CA8, 1964) (same).

[4] A "mere trespass" or violation of local property law has never been sufficient by itself to invoke the protection of the Fourth Amendment. *Hester v. United States, supra; McGuire v. United States*, 273 US 95 (1927); *Air Pollution Variance Board v. Western Alfalfa*, 416 US 861 (1974).

all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy" in the premises alleged to have been abandoned. *United States v. Wilson*, 472 F2d 901, 902 (CA9, 1972), *cert den*, 414 US 868 (1973). We contend that one can abandon any interest protected by the Fourth Amendment without at the same time giving up all property rights in the items seized or the area searched.

It is reasonable to assume that arson for profit will always involve facts similar to those of the instant case. The arsonist has complete control over the timing of the fire, and can be presumed to have removed personal items beforehand. Anything valuable will have been removed, save for whatever might be judged necessary to lend authenticity to an insurance claim. In short, besides "literally [having attempted to sell] his building back to the insurance company because there is nobody else who will buy it,"[5] the arsonist has left his building precisely as he knows it will be found by an invading army of firemen, police, fire investigators (whether with or without a warrant), insurance adjustors, vandals, looters, and children attracted to vacant buildings, all of whom arrive at what should be regarded as the arsonist's implicit invitation.

We do not contend that arsonists therefore are so guilty that they are not entitled to basic constitutional rights intended for the protection of the guilty as well as the innocent. In all other searches not involving

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[5] The words are attributed to New York City Deputy Chief Fire Marshal John Barracato in *Time*, Vol. 110, No. 18 (October 31, 1977), p. 22.

abandonment, the subject's sanctity or right of privacy in his home, business, car, person, or effects has been invaded to some degree, and that right is wholly independent of any underlying criminal activity in which he may be engaged or of any evidence of criminal activity which he may possess. Our point is rather that arson for profit is unique in that the nature of the crime speaks directly to the arsonist's expectation of privacy in his burned premises. It says that he has none whatsoever.

We contend that this fact, standing alone, is sufficient to justify the searches in this case, as well as in every criminal case involving arson for profit. Notwithstanding that investigators may not know beforehand whether a fire was deliberately set by the owner or lessee of the premises and that they may have time to get a search warrant (whether administrative or criminal investigative), the fact remains that no constitutional right will have been violated by such a search. The threshhold question of any search and seizure case, before a decision on the merits becomes necessary, is whether the defendant has standing to raise the issue, because "it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he, himself, was the victim of an invasion of privacy." *Jones v. United States*, 362 US 257, 261 (1960).[6] The case is at least as strong for not allowing one who has abandoned his

[6] "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent, conduct *which has deprived the defendant of some right.*" *Michigan v. Tucker*, 417 US 433, 447 (1974) (emphasis added).

property or premises to benefit from a suppression of items seized from those premises. By requiring a showing of standing, evidence can be admitted notwithstanding that it may have been seized in violation of a constitutional right, albeit somebody else's. *Brown v. United States, supra.* Allowing Respondents to benefit from the suppression of evidence in this case would in effect extend the Fourth Amendment exclusionary rule to cases in which *nobody's* rights were violated, solely because fire and police officials' actions might have invaded someone's privacy under similar but hypothetical circumstances. If the decision of the court below is to stand, it should do so to protect constitutional principles that would otherwise go unprotected, or to protect people who are likely to be aggrieved by post-fire searches and who cannot readily vindicate the rights that are thereby violated.

B. VICTIMS OF ACCIDENTAL FIRES OR OF MALICIOUS ARSON ARE IN NO NEED OF PROTECTION FROM POST-FIRE SEARCHES, AND WILL RECEIVE NONE FROM ADMINISTRATIVE SEARCH WARRANTS.

Once a fire has been extinguished, fire investigators are faced with two possibilities: (1) The owner or proprietor burned the premises himself, probably to collect under an insurance policy; or (2) the fire occurred accidentally or was maliciously set. If the former, no investigation of the premises will intrude upon a constitutionally protected area for the reasons set forth *supra*, Part I.A. If the latter, the police are dealing with members of the public as victims, not as criminals or suspects, with everything that implies.

It implies that firemen and police arrive in a benevolent role and, after extinguishing the fire, investigate to find the cause or origin of that fire to further important public and private interests. If the fire is a malicious arson, it is reasonable to conclude that the victims, whether or not they are present during the post-fire search, would concur in the police and fire department's desire to process the crime scene, to gather evidence, and to apprehend and prosecute the perpetrators.[7]

If the fire is accidental, the actions of fire investigators after the fire is extinguished are fairly predictable. Once

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[7] While uncooperative victims are not unknown to law enforcement, their recalcitrance usually shows when it is time to testify, after they have experienced, or have had an opportunity to reflect upon, the hazards and inconvenience of being witnesses. Even these victims usually are most adamant, immediately after the crime has occurred, about apprehending and punishing the perpetrators.

We do not contend that a warrantless search and forcible entry over the objections of the occupant would be permissible, *Colonnade Catering Corp v. United States*, 397 US 72 (1970), or that warrantless searches are not subject to the Fourth Amendment requirement of reasonableness. *United States v. Edwards*, 415 US 800, 808 n. 9 (1974). We concede that, if one affirmatively asserts his property rights as a bar to an inspection of his burned-out premises, a warrant should be obtained.

the fire is out,[8] they will observe the apparent focal point of the blaze to determine its source, and will examine that area for clues as to how the fire started. They will inspect any gas, fuel oil, or electrical lines and fixtures in the area, and if pipes or vents lead somewhere else (e.g., a vent leading to a furnace in the basement) they will extend their investigation to any area of a possible malfunction. Even when a mixture of curiosity and suspicion leads an investigator to gather evidence with a view toward possible prosecution, his motivation is not likely to control the scope and relative intrusiveness of

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[8] While firemen must do some "investigating" while they are fighting a fire simply to locate its source and eliminate its cause (and the potential cause of a recurring fire), the decision below, requiring an administrative search warrant, puts a premium on as thorough an investigation as is possible during the "exigent circumstances" stage of firefighting. Fire investigators will be encouraged to gather as much evidence as possible during the last stages of active firefighting, while there is danger of water and smoke damage to evidence. *United States v. Gargotto*, 510 F2d 409 (CA6, 1974), but also while steps and floors are slipperiest and carry the greatest danger of injury to firemen. That is also the time when smoke and steam make visibility its worst, with the attendant dangers of falling ceilings and collapsing floors. See *Wall Street Journal*, Vol. LVII, No. 251 (October 6, 1977), pp. 1, 20.

his search for the cause or origin of the fire, which is limited by its nature to burnt areas and possible sources of combustion. Though it will be detailed and focused in its technical aspect, it will be narrow and unobtrusive in its potential for abuse and invasion of privacy.[9] Insofar as the contact between citizens and official investigators will come when the citizens are regarded as victims, not as suspected criminals, much of the rationale for Fourth Amendment protection is absent.

The court below would require an administrative search warrant to protect whatever privacy interest may remain in burned premises. Yet in requiring administrative search warrants for area inspections, this Court relied heavily upon factors which distinguish *Camara* and *See* from the instant case. Where the homeowner or occupant may have no way of knowing the purpose or lawfulness of a routine building, fire, or health code inspection, the need to search for the cause or origin of an actual fire is obvious to anyone. There is no need to search for code violations at any particular time, whereas the timing of a post-fire inspection, after smoke and steam have dissipated but at the first

[9] This generalization is not meant to be absolute. If investigators are suspicious of arson for profit, they will be interested in the type of goods, clothing, and furnishings remaining on the premises. Such a search could extend into constitutionally protected areas of privacy, such as closets, but those areas are constitutionally protected only if the investigator's suspicions turn out to be unfounded. This possibility is remote though real, but Petitioner contends that, if the occupants of the home are not present, the investigators will look there if they are curious enough, with or without a warrant, and regardless of whether such an inspection is within the scope of the warrant. If the occupants *are* present, they will consent to, acquiesce in, or object to the search, and any search and seizure question will likely turn upon their reaction to that search.

opportunity for a thorough daylight visual examination of the scene, is an important element of the need to search. The general condition of the area, the passage of time since the last inspection, and the type of building involved are all irrelevant to post-disaster investigations. The "condition of the particular dwelling" or structure is important for the fact that a fire has occurred, and this alone should be sufficient to justify issuance of an administrative search warrant. But the fact of a fire is so readily ascertainable that there seems to be little need for individualized review. The judgment or discretion of anyone, much less of a disinterested magistrate, is unnecessary to determine its occurrence.[10]

While *Camara* and *See* dealt with the sanctity of occupied homes and the private portions of operational businesses, this case deals with permanently or temporarily uninhabitable premises which already have been disastrously disrupted and lawfully invaded to such a degree that any remaining expectation of privacy is likely to be negligible.[11] To the extent that it exists, it is not likely to be intruded upon by inspections of gas, fuel oil, or electrical systems, or of burnt areas of the home

[10] There is no realistic possibility that police or fire officials would fabricate a story of a fire that never occurred, and the credibility of the affiant will not be at issue in any meaningful sense.

[11] Because of these extensive contacts, post-fire searches seem akin to those in *United States v. Biswell*, 406 US 311 (1972), and *Cady v. Dombrowski*, 413 US 433 (1973), wherein the warrantless searches were justified at least in part by the fact that federally licensed firearms dealers (*Biswell*) and motor vehicles (*Cady v. Dombrowski*) already had such extensive legitimate contacts with law enforcement personnel that there was a reduced expectation of privacy in the highly regulated premises.

or business. Fire insurance policies often contain a clause requiring the insured to allow inspection of the premises by an agent of the insurance company,[12] as did Respondent Tyler's contracts (D. Ex. P & Q), indicating further a diminished prospect of privacy in burned premises. Finally, the frequency of state statutes allowing warrantless searches for the cause or origin of fires[13] suggests that such searches are widely regarded as reasonable.

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[12] E.g., Ariz Rev Stat 20-1503; Cal Code, Ins §2071; Conn Gen Stat Ann, §38-98; Ga Code Ann §56-3201; Haw Rev Stat §431-420; Ida Code §41-2401; Iowa Code Ann §515.138; La Stat Ann 22:691; Mich Comp Laws, 500.2832; Neb Rev Stat §44-501; NH Rev Stat Ann 407:22; NJ Stat Ann 17:36 - 5.20; NM Stat Ann 58-8-10; NY Consol Laws, Ins Law §168; NC Gen Stat §58-176; ND Cen Code 26-03-40; Okla Stat Ann 36 §4803; Pa Stat Ann, 40 §636; RI Gen Laws 27-5-3; Va Code Ann §38.1-366; WV Code Ann 33-17-2; Wisc Stat Ann 203.01

[13] Ala Code, 55 §34; Ark Stat Ann, 82-817; Cal Code, H & S, 13107, 13109; Colo Rev Stat 32-5-341; Conn Gen Stat Ann 29-57; Del Code 16, §6607 (f); Ga Code Ann, 92A-723; Haw Rev Stat, §132-5; Ill Rev Stat, 127½ §6; Iowa Code Ann, 100.2, 100.10, 100.12; Kan Stat Ann, 31-137; Ky Rev Stat 227.240; La Stat Ann 40:1566; Maine Rev Stat Ann 25 §2394; Md Code Ann, 38A §8 (f); Mass Gen Laws Ann 148 §2; Mich Comp Laws, §29.6; Minn Stat Ann, 299F.04, 299F.08; Miss Code Ann §45-11-1; Mont Rev Code §§82-1209, 82-1217; Neb Rev Stat §§81-506, 81-511; NM Stat Ann §4-16-8; NC Gen Stat §69-1; Oh Rev Code, §3737.08; Okla Stat Ann 74.314; Ore Rev Stat, 476.070(1); Pa Stat Ann, 53 §16598; RI Gen Laws §23-28.2-10; SC Code §37-84; SD Law 34-32-5; Vt Stat Ann T20 §§2861, 2863; Va Code, 27-56; 27-58; Wash Rev Code Ann §48.48.030; WV Code Ann §29-3-12; Wisc Stat Ann §165.55 (a); Wyo Stat Ann §§35-422, 35-425.

Only Michigan and Indiana[14] require a search warrant for an investigation of fire-damaged premises. Other state[15] and federal[16] courts have permitted warrantless searches for the source of a fire, though the decisions sometimes strain to uphold the search as pursuant to an exigent circumstance. Since an arsonist will never suffer an intrusion into a constitutionally protected area by a search of fire-damaged premises, and since the possibility that victims will resent such an inspection or will thereby suffer an invasion of what little is left of their privacy in such premises is very slight, this Court should hold that such warrantless searches are permissible.

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[14] *State v. Buxton*, 238 Ind 93; 148 NE2d 547 (1958). Though there is an apparent split of authority in California, cf. *Romero v. Superior Court*, 266 Cal App 2d 714; 72 Cal Rptr 430 (1968), with *Swan v. Superior Court*, 8 Cal App 3d 392; 87 Cal Rptr 280 (1970), the most recent case, *People v. Saling*, 48 Cal App 3d 724; 122 Cal Rptr 1, 13-14 (1975), suggests that a warrantless investigation after the fire has been extinguished is permissible.

[15] *State v. Cohn*, 347 SW2d 691 (Mo, 1961); *Bennett v. Commonwealth*, 212 Va 863; 188 SE2d 215 (1972); *Stone v. Commonwealth*, 418 SW2d 646, 652 (Ky App, 1967); *State v. Rees*, 258 Iowa 813; 139 NW2d 406 (1966); *State v. Murdock*, 160 Mont 95; 500 P2d 387 (1972); *State v. Vader*, 114 NJ Super 260; 276 A2d 151 (1971); *State v. Felger*, 19 Or App 39; 526 P2d 611 (1974); *People v. Patrick*, 41 Ill App 3d 1037; 355 NE2d 224 (1976).

[16] *United States v. Gargotto*, 510 F2d 409 (CA6, 1974); *United States v. Green*, 474 F2d 1385 (CA5, 1973); *Steigler v. Anderson*, 360 F Supp 1286 (D Del, 1973), *aff'd*, 496 F2d 793 (CA3, 1974); *Bailey v. Michigan*, 493 F2d 1218 (CA6, 1974).

II.

A WARRANTLESS SEARCH OF FIRE-DAMAGED PREMISES TO GATHER EVIDENCE OF THE CAUSE OR ORIGIN OF THE FIRE, CONDUCTED UNDER CIRCUMSTANCES WHICH INDICATED THAT THE OCCUPANT HAD NO EXPECTATION OF PRIVACY IN THOSE PREMISES, WAS CONSTITUTIONALLY PERMISSIBLE, NOTWITHSTANDING THAT NO EXIGENT CIRCUMSTANCES EXISTED, THAT OFFICERS HAD WITHIN THEIR KNOWLEDGE FACTS UNQUESTIONABLY SHOWING PROBABLE CAUSE, AND THAT OFFICERS HAD AMPLE TIME TO GET A SEARCH WARRANT.

Sergeant Hoffman conducted a search of the burned-out building on February 16, three and one-half weeks after the fire and two and one-half weeks after having examined the premises with Respondent Tyler. At that time Hoffman seized a piece of fuse, pieces of glass, and other debris, all of which were admitted at trial over objection. Since those items could have been seized from the premises on the morning following the fire, we contend that if our analysis in Part I, *supra*, is accepted, this later search should be regarded merely as a continuation of a search valid at its inception. If officers at a later time conduct or continue a warrantless search which does not exceed the scope of that which they were allowed to conduct earlier, the passage of time is of no constitutional significance. *United States v. Edwards*, 415 US 800 (1974).

Whether the investigators failed to get a warrant for this search because of carelessness, contempt for constitutional rights, or because they reasoned intuitively that the premises had been abandoned cannot be determined from this record. The thought of obtaining a warrant seems never to have occurred to them. By the time of the search, Oscar Frisch had already implicated both Respondents by describing the elaborate preparations for the burning.[17] There was, of course, ample time to obtain a warrant, and there were no exigent circumstances. While the officers should have obtained a warrant, we contend that they should have done so for reasons of prudent and careful police work, not because a warrant was constitutionally required.

The repeated statements by this Court to the effect that, "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant,"[18] rest upon the implied premise that one raising the issue can complain of the violation of one of his constitutional rights. Since we contend that the record shows beyond a reasonable doubt that Respondent Tyler burned his own premises, that he thereby abandoned those premises within the meaning of

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[17] He first gave his story to Detective Webb on January 31, 1970 (R.265).

[18] *Camara v. Municipal Court, supra*, at 528-529, and cases cited therein.

the Fourth Amendment, and that police and fire officials knew of his culpability at the time of the February 16 search, the only question remaining is whether a disinterested magistrate should have made a determination on the question of abandonment before the search took place.

The Fourth Amendment requires that a neutral magistrate determine the question of probable cause, of "[w]hen the right of privacy must reasonably yield to the right of search. . ." *Johnson v. United States*, 333 US 10, 14 (1948). By contrast, it has never been held that a neutral magistrate need make an antecedent determination of whether a proposed search is likely to intrude upon a constitutionally protected area, notwithstanding that such a requirement would provide at least an increment of protection for those whose premises were searched after officers had wrongly estimated that their actions were unobtrusive. In general, the police are free to conduct any investigation as they see fit, so long as no individual rights are violated in the process.

Even when there has been ample opportunity to obtain a warrant, it has never been suggested that a magistrate first pass upon the question of consent, *Zap v. United States*, 328 US 624 (1946), vacated on other grounds, 330 US 800 (1947); *Bumper v. North Carolina*, 391 US 543 (1968); of whether a car was properly seized pursuant to forfeiture proceedings, *Cooper v. California*, 386 US 58 (1967), or was being safeguarded or inventoried pursuant to standard procedures, *Harris v. United States*, 390 US 234 (1968); *South Dakota v. Opperman*, 428 US 364 (1976); of whether a search was conducted in "open

fields" rather than within the curtilage of a structure, *Hester v. United States, supra*; *Air Pollution Variance Board v. Western Alfalfa, supra*; or, as in the instant case, of whether the premises searched or the items seized had been abandoned within the meaning of the Fourth Amendment, *Hester v. United States, supra; Abel v. United States*, 362 US 217 (1960).[19]

Because officers had probable cause and ample time to obtain a warrant, and were faced with no exigency, this second search closely resembles those in which this Court has required that a warrant be obtained. Were the focus in this case to be exclusively upon the

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[19] The United States Courts of Appeals have repeatedly allowed the searching officers to determine the question of abandonment, subject only to subsequent judicial scrutiny, e.g., *Rees v. Peyton*, 341 F2d 859, 863 (CA4, 1965) (en banc) (hidden suitcase); *Friedman v. United States*, 347 F2d 697 (CA8), *cert den*, 382 US 946 (1965) (leasehold abandoned); *Elledge v. United States*, 359 F2d 404 (CA9, 1966) (package); *Argo v. United States*, 378 F2d 301 (CA9, 1967) (apartment tenancy); *United States v. Cowan*, 396 F2d 83, 87 (CA2, 1968) (luggage left at hotel); *United States v. Dzialak*, 441 F2d 212 (CA2, 1971) (garbage); *United States v. Kress*, 446 F2d 358 (CA9), *cert den* 404 US 947 (1971) (tenancy); *United States v. Jackson*, 448 F2d 963, 970-971 (CA9, 1971), *cert den sub nom Willis v. United States*, 405 US 924 (1972) (motel room); *United States v. Wilson, supra* (tenancy); *United States v. Brown*, 473 F2d 952 (CA5, 1973) (interior of buried suitcase); *United States v. Colbert*, 474 F2d 1974 (CA5, 1973) (en banc) (suitcases); *United States v. Edwards*, 441 F2d 749 (CA5, 1971) (defendant flees automobile during chase); *United States v. Moody*, 485 F2d 531 (CA3, 1973) (same), even where the officers were not aware of facts sufficient to show abandonment at the time of the search. *Feguer v. United States*, 302 F2d 214 (CA8), *cert den*, 371 US 872 (1962) (tenancy); *Parman v. United States, supra* (same).

officials' conduct, a close question would be presented. We contend that the approach should be two-fold, so as to focus as well upon the presence or absence of the violation of a constitutional right. Cf. *United States v. Edwards*, 415 US 800 (1974). The fact remains that the record shows a clear abandonment of any interest entitled to constitutional protection. If this Court is ever to make an abrupt break with all past decisions, and for the first time hold that one may benefit from the Fourth Amendment exclusionary rule without first showing that he is the victim of a constitutional violation, but rather by arguing that the rights of others might have been violated under similar, though abstract and hypothetical circumstances, it should do so in a case in which the hypothetical Fourth Amendment violation is a serious one. One, in other words, in which the privacy interest which might be intruded upon is substantial, not slight; in which the police conduct is egregious and flagrantly abusive, not relatively innocuous; and in which innocent property owners are likely to be seriously aggrieved, rather than one in which resentment or apprehension of a possible invasion of privacy is likely to be the farthest thing from their minds. A case involving a post-fire investigation is not such a case.

III

THE PROSECUTION SHOULD BE ENTITLED TO A DECISION ON THE MERITS OF A QUESTION OF STANDING AT ANY STAGE OF THE CRIMINAL PROCEEDINGS.

Respondent Tompkins was not on the premises at the time of the contested searches, was not charged with a possessory offense, and appears to have had no

proprietary or possessory interest in Tyler's action. He lacks standing to raise the issue of an unconstitutional search and seizure under this Court's holding in *Brown v. United States, supra.*[20]

The prosecution failed to raise this issue in the trial court and in the Michigan Court of Appeals, and can offer no good reason for having failed to do so. The Michigan Supreme Court refused to consider the issue on the merits, 399 Mich at 571; 250 NW2d at 470-471; Pet. at 19-20, although under Michigan law it has the power to consider any question not properly raised and preserved in order to prevent a serious injustice. *People v. Crittle*, 390 Mich 367, 370-371; 212 NW2d 196, 197-198 (1973); *People v. Moore*, 391 Mich 426, 431; 216 NW2d 770, 773 (1974). Under these circumstances, this Court has jurisdiction to decide the substantive issue. *Williams v. Georgia*, 349 US 375, 382-389 (1955).

We contended in our petition for certiorari that, "Respondent Tompkins was not prejudiced in any way by the prosecution's failure to raise this issue in a timely manner" (Pet. 16). That is incorrect because, though he had to endure the trial and appellate process nonetheless, had the issue been raised at trial he would have been entitled to an opportunity to establish his standing at a hearing. *Simmons v. United States*, 390 US 377 (1968). Accordingly, should one or both of the search and seizure issues in this case be decided in Respondents' favor, we ask not for a decision on the merits of the standing issue but rather for a *Simmons* hearing in the

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[20] This issue was poorly framed in the petition for certiorari, in that the question answered itself. We believe the present framing of the issue more clearly reflects the argument actually put forward in the petition.

trial court. Should Respondent Tompkins fail to establish standing at that hearing, his judgment of conviction should be reinstated.

Though the prosecution rarely if ever is granted the procedural latitude allowed defendants in raising federal questions, this waiver rule should be relaxed when two factors coincide: (1) a serious miscarriage of justice will result if the federal question is not decided; and (2) no federal right of the defendant will have been violated.

A finding of no standing would mean, of course, that Respondent Tompkins' Fourth Amendment rights have not been violated. He would be given his right to a *Simmons* hearing upon remand.

The public interest requires that those duly convicted, by a process in which none of their rights have been violated, remain convicted. Should Respondents' position on the search and seizure issues prevail, and should Tompkins in fact lack standing, the reversal of his judgment of conviction would entitle him to a retrial identical in all constitutional respects to his original trial. This would involve a vast expenditure of judicial resources, an undeserved second chance at a not guilty verdict, and a prosecution case likely to have been weakened by the passage of over seven years. This injustice can be avoided by allowing the prosecution a *Simmons* hearing, with instructions to reinstate the judgment of conviction should no standing be found.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court reverse the judgment of the Supreme Court of the State of Michigan on the Fourth Amendment issues presented. If that judgment is upheld, Petitioner requests in the alternative that a hearing on the standing issue be ordered, with instructions to reinstate Respondent Tompkins' judgment of conviction should no standing be found.

Respectfully submitted,

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Dated: November 15, 1977

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1608

STATE OF MICHIGAN,
Petitioner,

v.

LOREN TYLER and ROBERT TOMPKINS,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

STATEMENT OF FACTS

Respondents wish to make the following additions to the Statement of Facts.

Page 4, paragraph 2. Fire Chief See seized the two plastic containers only after summoning Detective Webb of the Police Department. (A. at 11 — 12.)

Page 4, paragraph 4. The purpose of Assistant Fire Chief Somerville's visit was solely and exclusively for investigation and gathering of evidence of the arson fire. (A. at 23.)

Page 4, paragraph 4. When Assistant Fire Chief Somerville entered the premises, it was obvious to Assistant Fire Chief Somerville that the public was not invited. (A. at 22.)

Page 5, paragraph 0. The record does not indicate that the business records on the floor were damaged.

Page 5, paragraph 0. The business records were seized without a warrant and sent to the Michigan State Police Crime Lab in Warren. (A. at 50.)

Page 5, paragraph 3. By January 29 the police or fire department had placed a lock on the front door of the building. But since the plywood on the door on the right hand side of the steps had been knocked out, one could enter the building without a key. (A. at 69.)

Page 6, paragraph 1. Tyler had some records on the premises. He was never allowed to see them after the fire. (A. at 70.)

SUMMARY OF ARGUMENT

Respondents had a reasonable expectation of privacy before the fire occurred. Unless something happened that destroyed Respondent' expectation of privacy or the

reasonableness of that expectation, the searches and seizures by the police intruded on constitutionally protected interests in privacy. The fact that a fire occurs does not destroy expectation of privacy unless nothing remains that someone would want to protect as private. The fact that a fire was deliberately set does not destroy privacy. Regardless whether a victim of a fire set tte fire, he may still want to preserve as private certain property. If so, the constitutionally protected interest in privacy remains after the fire. Nor can a statute authorizing warrantless post fire searches destroy the reasonableness of an expectation of privacy. The statutes authorize general, nonspecific searches which are incompatible with the Fourth Amendment. Nor can this court permit Petitioner to justify the intrusion by information that Petitioner became aware of after the search was made. To do so would let the end of conviction justify the means and would permit remediless intrusions on the privacy of innocent persons.

Moreover, the privacy analysis should not be used to permit the seizure of private property just because no one's expectation of privacy will be invaded. A person's property rights should be entitled to some Fourth Amendment protection.

Before conducting a search of fire-damaged premises, the fire or police officials should be required to obtain a warrant. A warrant would limit abuses of discretion on whether to search and the scope of the search.

ARGUMENT

I. UNLESS CONSENT HAS BEEN OBTAINED, THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION REQUIRES A WARRANT TO BE OBTAINED TO CONDUCT A SEARCH OF FIRE-DAMAGED PREMISES, WHETHER ADMINISTRATIVE OR TO FURTHER A CRIMINAL INVESTIGATION, UNLESS THE SEARCH FALLS WITHIN ONE OF THE RECOGNIZED EXCEPTIONS.

A. Searches And Seizures On Fire-Damaged Premises Are Searches And Seizures Within The Meaning Of The Fourth Amendment.

The crucial question in this appeal is whether the searches and seizures conducted by the police in this case are searches and seizures within the meaning of the Fourth Amendment. The Prosecutor maintains that they are not. Respondents maintain they are.

The protection of the Fourth Amendment does not depend on what area is being intruded on.

Under *Katz* v *United States*, 389 U.S. 347 (1967), whether Respondents were protected by the Fourth Amendment in the present case depends on whether the searches and seizures conducted by the Assistant Fire Chief and the police officials violated the privacy on which Respondents justifiably relied. If so, this Court will then have to consider whether the searches should have been made only after a warrant was obtained.

Before a fire occurs, a businessman has a justifiable expectation of privacy in parts of the premises that are

not open to the public. *See* v *Seattle*, 387 U.S. 541 (1967). That is, a businessman can reasonably expect to "not be disturbed except by personal or business invitees, and that records [will] not be taken except with his permission . . ." *Mancusi* v *DeForte*, 392 U.S. 364, 369 (1968).

Nor does the occurrence of a fire make a businessman's reliance on privacy less justifiable. After a fire he has the same legal rights and powers to limit access to his building (and thus preserve his privacy) that he had before the fire.

> "The property continues to be protected by the law from looters . . . ." *People* v *Tyler*, 399 Mich. 564, 582, 250 NW2d 467, 476 (1977).

Petitioner may argue that a businessman no longer has a reasonable expectation of privacy after a fire because of the knowing exposures made to members of the public as a result of the fire. This argument should be rejected.

Admittedly, a fire causes a businessman to consent to certain exposures to members of the public that would not occur otherwise. Firemen must be admitted to fight the fire. Representatives of the businessman's insurance company must be admitted to inspect the damage. Workmen must be admitted to do the repairs.

But consent to these necessary instrusions does not mean that the businessman is throwing open the premises to the public.

> "A fire is not an invitation to any or all to enter to satisfy their curiosity or for any tther purpose. It does not open the property to public scrutiny." *People* v *Tyler*, 399 Mich. 564, 582, 250 NW2d 467, 476 (1977).

Consequently, the businessman has not surrendered any expectation of privacy by consenting to necessary intrusions by individuals because only:

> "what a person knowingly exposes *to the public*, even in his home or office, is not a subject of Fourth Amendment protection." *Katz* v *United States*, 389 U.S. 347, 351 (1967) (Emphasis by Respondents).

Petitioner may claim that expectations of privacy terminate when a fire is deliberately set. This argument should be rejected.

If a victim of an arson fire helped set the fire, he still expects some privacy. While setting the fire voluntarily exposes the area to some persons — the firemen, the insurance company investigators, and the repairmen — the arsonist does not open the area to the public. He still expects to limit access to the premises.

So long as the arsonist is entitled to possession of the property, the law will help the arsonist protect his property against unwanted intrusions by private individuals. That a Plaintiff is an arsonist is no defense to either a civil or criminal trespass action.

No reason exists why the law should not provide the same assistance when the unwanted and unauthorized intrusion is by a government official.

On the other hand, if the victim of an arson fire was not connected with setting it, that victim clearly has a reasonable expectation of privacy. The exposures that an innocent victim must suffer because of a fire result from someone else's criminal act. While such involuntary exposures diminish one's privacy, a person may still

"[seek] to preserve as private," *Katz* v *United States*, 389 U.S. 347, 351 (1967), what has been exposed; if so, what remains of his privacy should still be constitutionally protected. To hold otherwise would mean that a rape victim has no constitutionally protected interest in privacy but her rapist does. Surely that cannot be the law.

Since the innocent victim's claim to constitutionally protected privacy is stronger than the arson, an understandable desire may exist to hold that the arsonist's expectation of privacy is terminated but not the innocent victim's.

Under such a holding the privacy of innocent victims almost certainly would be violated. Once the police know that a fire was deliberately set, police suspicion falls indiscriminately on all owners and occupants. Thus, the privacy of innocent owners and occupants could easily be violated. Even if police suspicion focuses instantly on the arsonist and no one else, searching the arsonist's property can intrude on an innocent victim's privacy.

If an innocent victim's privacy is violated, he has no practical remedy for the violation. Consequently, nothing would discourage the police from inadvertently or intentionally intruding on the privacy of other innocent victims in the future.

Thus, to protect the privacy of innocent victims of an arson fire, this court must hold that no one's interest in privacy is terminated by the fact that the fire was deliberately set.

Petitioner makes a second argument to support the claim that no reasonable expectation of privacy remains after a fire. Petitioner argues that since many states have

passed statutes authorizing warrantless post fire searches, no constitutionally protected interest in privacy is violated by such searches for two reasons. First, Petitioner asserts that the existence of the statutes shows that such searches are reasonable and therefore not within the prohibition of the Fourth Amendment. Second, "only if the expectation [of privacy] be one that society is prepared to recognize as 'reasonable,' " *Katz* v *United States*, 389 U.S. 347, 361 (1967) (concurring opinion of J. Harlan), will it receive consitutional protection. Since the statutes in question authorize warrantless post fire searches, society does not recognize as reasonable the expectation that police and fire officials may be excluded to protect privacy; therefore that expectation is not constitutionally protected.

Both of these arguments should be rejected.

That one or more legislatures determines that a search is reasonable or that an expectation of privacy is unreasonable does not require courts to reach the same conclusion. Thus, the lower court cases that consider the constitutionality of searches made to prevent hijackings do not hold that since Congress prescribed searches, the searches are reasonable. Instead the courts determine from the facts presented to them whether reasonable expectations of privacy have been violated and whether the searches were reasonable. See Annot., 14 A.L.R Fed. 286 (1973).

This Court and our history give general criteria for determining whether a search is reasonable. Under those criteria, the searches permited by these statutes are unreasonable.

Mich. Comp. Laws Ann. §29.6 is typical of these statutes. It says:

> "The director or any officer is authorized to investigate and inquire into the cause or origin of a fire occurring in this state resulting in loss of life or damage to property, and for that purpose may enter, without restraint or liability for trespass, any building or premises and inspect the same and the contents and occupancies thereof."

Since the statute authorizes warrantless searches, the reasonableness of the searches is immediately suspect. The general rule is that:

> "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions." *Katz* v *United States*, 389 U.S. 347, 359 (1967).

Since the statute authorizes searches that violate this general rule, the reasonableness of the searches is suspect.

Since the statute gives the officer in the field discretion whether to search, the reasonableness of the search is even more suspect. Giving such discretion to the searching officer runs counter to:

> "The historical judgment, which the Fourth Amendment accepts, . . . that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *United States* v *United States District Court*, 407 U.S. 297, 317 (1972).

Petitioner suggests that these principles are irrelevant to the present case because once a magistrate determines that a fire occurred, a warrant will automatically issue. Implicitly Petitioner suggests that the discretion to search cannot be abused. This is not so. The discretion to search can be abused if the search is too long after the fire, if the number of entries to conduct searches is so high that it disrupts reconstruction or the lives of the inhabitants, or if the time of day that the search is conducted is especially disruptive of the lives of the inhabitants. Since the discretion to search can be abused, a magistrate should be interposed between the citizen and the searching officer.

While warrantless searches are not necessarily unreasonable, the statute permits general, nonspecific searches which are, by definition, unreasonable. The statute does not carefully limit the scope of a search to constitutionally innocuous areas such as "gas, fuel oil, or electrical systems, or of burned areas of the home or business." Petitioner's Brief at 17 - 18. Instead, it leaves to the searching officer the decision whether to examine "goods, clothing, and furnishings remaining on the premises," Petitioner's Brief at 16, n. 9; whether to seize and examine personal papers or business records; and whether to place a chain on the door and seize the entire premises (as was done in this case). Nor does a statute require the searching officer to be looking for a specific piece of evidence. Instead, the searching officer can look at anything he wants to see if any of it might be evidence. This country's founding fathers judged such nonspecific, general searches to be offensive and patently unreasonable when conducted with a warrant. The lack of a warrant does not change that judgment.

Thus, the searches permitted by these statutes are not reasonable and would remain unreasonable even if all 50 states passed such statutes.

Nor can the passage of these statutes strip a citizen of the expectation that he will not be subjected to a general, nonspecific search. Such a law is as incompatible with a free society as a law saying a citizen has no expectation of privacy in his own home, and until the Constitution is changed, such statutes must be struck down.

Therefore, the existence of statutes permitting warrantless post fire searches does not cause Respondents' constitutionally protected interest in privacy to disappear or alter the conclusion that the searches authorized by these statutes are unreasonable.

Petitioner advances yet another argument against holding that a constitutionally protected interest in privacy exists after a fire. Petitioner says that most persons would consent to a search of fire damaged premises and then impliedly concludes that such searches therefore do not violate any constitutionally protected interest in privacy. This argument is not well founded. *Camara* v *Municipal Court*, 387 U.S. 523 (1967), required a warrant to be obtained before an administrative search could be conducted even though "most citizens allow inspection of their property without a warrant." 387 U.S. at 539. Thus *Camara* rejects Petitioner's argument.

Lastly, Petitioner suggests that no constitutionally protected interest in privacy was intruded on because the record establishes that Respondents are guilty of arson, and arsonists have abandoned the premises within the meaning of the Fourth Amendment.

This argument is a direct attack on our traditions of liberty and justice. In essence, the Petitoner is saying that because there has been a conviction by a jury of arson that therefore the evidence used to obtain that conviction is legal and proper because there is a conviction of arson. In short, the end justifies the means.

This type of argument is pernicious. In effect, Petitioner is asking this Court to rule that neither the arsonist nor his victim have any interest in privacy. And that the police should have uncontrolled discretion to conduct any type of intrusion in privacy simply because the fire appears to have been deliberately set.

Any type of nonspecific search is probably impermissible when conducted with a warrant, much less without a warrant.

Traditionally, the courts of this land have required court approval prior to making a search that constitutes an intrusion on privacy.

Petitioner wants the police to conduct a search with total disregard to whether persons have surrendered their interest in privacy merely because there appears to be an incendiary fire.

There is a further fallacy in Petitioner's reasoning. The Petitioner makes no distinction between whether the victim of the search is the arsonist himself or his innocent victim. In the subject case the fire officials and the police officials found gasoline which obviously indicated an apparent manmade fire. Certainly, this is just and reasonable cause to go to a magistrate and obtain a search warrant. No reasonable excuse or explanation has been made in this record as to why the fire or police officials did not bother to go to a magistrate and obtain a

search warrant. Now Petitioner asks this Court to eliminate the requirement of a search warrant merely because there was an apparent incendiary fire and a subsequent jury conviction.

To allow the police or fire officials such power requires the total abrogation of all concepts of privacy or privacy protection.

This Court must not allow or permit privacy to be subject to the whim of the police officer. At the very least, government officials must be required to act with respect for the rights of a person based on the facts in the possession of the official at the time of the act. To hold otherwise, to hold that an official may act with disregard for what he perceives to be the rights of an individual in the hope of an eventual justification would be an unprecedented departure from the principles this country was founded upon.

Additionally, even if some type of temporary abandonment occurred within the meaning of the Fourth Amendment, Respondents reestablished their interest in privacy after the fire. Immediately after the fire, the Assistant Fire Chief knew that the premises were not open to the public. Subsequent events confirmed that the public was not invited in. The building was boarded up. Additionally,

> "The record does not support a conclusion that Tyler had abandoned the fire damaged premises." *People* v *Tyler*, 399 Mich. 564, 583, 250 NW2d 467, 476 (1977).

Such evidence shows that Respondents sought to protect as private the building and therefore reestablished a constitutionally protected interest in privacy.

For the reasons set forth before, Respondents submit that they have a constitutionally protected privacy after the fire.

However, the privacy analysis conceals the radical change that Petitioner is asking this court to make.

As *Katz* noted, the Fourth Amendment protects more than privacy.

> "That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." 389 U.S. at 350.

One of the rights the Fourth Amendment protects is the right to not have private property searched or seized without a warrant.

> "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable unless it has been authorized by a valid search warrant.'" *Camara* v *Municipal Court*, 387 U.S. 523, 528 - 529 (1967).

In fact, the protection of private property is one of the fundamental tenets of this country's history.

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete

> form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by its conviction of some public offense; it is the invasion of the sacred right which underlies and constitutes the essence of Lord Camden's judgment. *Boyd* v *United States*, 116 U.S. 616, 626 - 627, 630 (1874).

Petitioner wants to alter this principle so that searches of private property need not be authorized by a warrant if the police suspect that the owners or occupants are arsonists.

While modern courts are more sensitive to violations of privacy than earlier courts, this Court should not abandon the well-established rule that absent exigent circumstances, a person's right to control his property cannot be interfered with unless the interference is authorized by a court.

Thus, this court should hold that the Fourth Amendment protects persons after a fire for two reasons. First, there is a strong potential that constitutionally protected expectations of privacy will be invaded. Second, to permit this type of general search of private property without a warrant is completely foreign to our history and repugnant to the principles this country was founded on.

B. A Warrant Should be Required Before a Post Fire Search is Conducted.

The general rule is that a warrant should be obtained before a search is conducted. *Katz* v *United States*, 389 U.S. 347, 357 (1967).

United States v *Martinez-Fuerte*, 428 U.S. 543 (1976), rejected that a warrant should be required before checkpoint locations at the border of the United States were constitutional. In reaching that conclusion, this court reviewed the reasons that warrants have been required.

> " '[W]hen [an] inspector [without a warrant] demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.' 387 U.S. at 532.
>
> A warrant provided assurance to the occupant on these scores. We believe that the visible manifestations of the field officer's authority at a checkpoint provides substantially the same assurances in this case.
>
> Other purposes served by the requirement of a warrant also are inapplicable here. One such purpose is to prevent hindsight from coloring the evaluation of the reasonableness of the search or seizure. . . . The reasonableness of checkpoint stops, however, turns on factors such as location and method of operation of the checkpoint,

> factors that are not susceptible to the distortion of hindsight, and therefore will be open to post stop review notwithstanding the absence of a warrant. Another purpose of a warrant requirement is to substitute the judgment of the magistrate for that of the searching or seizing officer. . . . But the need for this is reduced when the decision to 'seize' is not entirely in the hands of the officer in the field, and deference is to be given to the administrative decisions of higher ranking officials." 428 U.S. at 564 - 566.

Each of these reasons for requiring a warrant exists in the present case.

Strong Fourth Amendment interests can be present. A place of business is protected almost as much as the home. Depending on what remains after the fire, the invasion can be almost as intrusive as an invasion before the fire. Thus, tradition requires a warrant to be obtained before the fire.

The reasons advanced in *Camara* for requiring a warrant exist here. An occupant of a building has no way of knowing whether the code requires the search to be made, or what the searching official can look at. For example, Respondents did not know whether the police or fire officials had the right to make repeated visits. Nor did Respondents know whether the police could seize papers from the building. Nor did Respondents know whether the police could put a chain and lock on Respondents' building. In other cases where less damage occurs, persons would not know whether officials have the right to examine closets, goods, and clothing; nor would they know whether officials have the right to search undamaged areas of the building.

Hindsight can color the reasonableness of a search, especially if the search extends beyond the burned-out areas. In such a case, the investigator has usually determined that arson has occurred and turns to the question whether the occupant is the arsonist. Both conclusions may rest on suspicions rather than articulable facts.

Lastly, a warrant should be required to place the neutral judgment of a magistrate between the citizen and the searching officer. Under Petitioner's rule, the decision to search and the scope of the search are completely in control of the officer in the field. The courts have traditionally refused to give a searching official that much discretion and have required that a warrant be obtained.

Imposing the requirement that a warrant be obtained will not adversely affect the public interest.

> "As the facts of this case illustrate, requiring a warrant would not burden unduly officials whose duty it is to extinguish fires and investigate their causes. Evidence acquired while firefighters are lawfully on the premises putting out the fire is admissible under the plain view doctrine. The owner of the property will often consent to a search. In other cases, as here, there will be probable cause to justify the issuance of a search warrant as part of a criminal investigation. If there is insufficient evidence to justify issuance of a warrant as part of a criminal investigation but there is a sufficient basis for an investigation within 'reasonable legislative or administrative standards' to determine the cause of the fire, a warrant might issue on that basis.

> If there are exigent circumstances, such as reason to believe that the destruction of evidence is imminent or that a further entry of the premises is necessary to prevent the recurrence of the fire, no warrant is required and evidence discovered is admissible." *People* v *Tyler*, 399 Mich. 564, 578, 250 NW2d 467, 474 (1977).

Since the general rule is that a warrant must be obtained before an unconsented search can be made, since the reasons for requiring a warrant exist when officials make a post fire search, and since requiring a warrant would not adversely affect the public interest, this court should hold that the police are required to obtain a warrant before any search is conducted of fire-damaged premises.

C. Even if the Warrant is not Required for an Administrative Search, A Warrant Should Be Required for a Criminal Search.

Even if a warrant is not required for an administrative search of fire-damaged premises, a warrant should be required for a criminal search.

A criminal search is more intrusive physically than an administrative search for the cause of the fire. The search for the cause of the fire terminates when the fire chief determines that the fire was arson. At that point the arson investigator sets out to collect evidence to identify the arsonist. To do so, the arson investigator may look at the goods, clothing, and furnishings remaining on the premises. Petitioner's Brief at 16, n. 9. He might seize and examine the records and personal papers found on

the premises. Or he might seal off the premises from everyone, including the owner, in order to preserve evidence. These investigations far exceed the physical intrusion by someone who just wants to determine the cause of a fire.

A criminal search is more hostile than an administrative search. An administrative search violates only the right to privacy while a criminal search also violates Fifth Amendment rights of self protection. *Frank* v *Maryland*, 359 U.S. 360 (1959).

Since a search of fire-damaged premises that is part of a criminal search is more intrusive and more hostile, a warrant should be required for a criminal search even if one is not required for an administrative search.

In the present case, all of the searches after the initial seizure during the fire were part of a criminal investigation. The police were called to the scene of the fire before the first seizure was made. Except for the search by the Assistant Fire Chief the next morning for the extent of the damage, the police were involved in all searches subsequent to the initial search and conducted many of the searches without the assistance of the fire department officials. Additionally, the Assistant Fire Chief admitted that the only purpose of the searches was to collect evidence of arson.

Consequently, a warrant should have been obtained before this search which was part of a criminal investigation was made.

II. IF THIS COURT DETERMINES THAT THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS NOT VIOLATED BY THE SEARCHES, THIS COURT SHOULD REMAND THIS CASE TO THE MICHIGAN SUPREME COURT FOR DETERMINATION OF WHETHER THE SEARCHES VIOLATED THE PARALLEL PROVISION IN THE MICHIGAN STATE CONSTITUTION.

Even if the searches in the present case did not violate the Fourth Amendment of the United States Constitution, the searches may have violated the parallel provision in the Michigan Constitution. Mich. Const. Art. I, §11. Thus, if this Court determines that the Fourth Amendment of the United States Constitution was not violated, a remand to the Michigan Supreme Court would be in order.

A remand would be particularly appropriate in the present case. The circumstances under which State officials may conduct searches of a state's citizens is an important state question. While the United States Constitution puts a floor beneath which the states may not go, states are free to more liberally interpret parallel provisions. In this case, a more liberal construction could result from either a broader view of what privacy a citizen may reasonably expect or from a more encompassing view of when warrants should be required.

Past experience in Michigan indicates that the possibility of differing interpretations is more than theoretical. *People* v *Turner*, 390 Mich. 7, 210 NW2d 336 (1973).

Consequently, even if this Court determines that the Fourth Amendment of the United States Constitution was not violated, the case should be remanded to the Michigan Supreme Court.

III. THIS COURT DOES NOT HAVE JURISDICTION TO ORDER A HEARING ON TOMPKINS' STANDING.

Admittedly, the Michigan Supreme Court had discretion to hear and decide whether to order a standing hearing for Respondent Tompkins. While a discretionary refusal by a state court to hear substantive arguments on a Federal right may lead to this court having jurisdiction of the Federal question, this court has jurisdiction of the substantive question only if "the state court action in the particular circumstances is, in effect, an avoidance of the Federal right." *Williams* v *Georgia*, 349 U.S. 375, 383 (1955). No such showing has been made in this case. Consequently, this Court does not have jurisdiction of the substantive question.

RELIEF REQUESTED

Respondents pray that this Court will either:

(a) affirm the judgment of the Supreme Court of the State of Michigan on the Fourth Amendment issues presented, or

(b) reverse the judgment of the Supreme Court of the State of Michigan on the Fourth Amendment issues presented and remand the case to the Michigan Supreme Court for a determination of the issues under the parallel provisions of the Michigan State Constitution.

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December 12, 1977